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Supreme Court, U.S.
FILED

No. 09-699

DEC 7 - 2009

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In The

Supreme Court of the United States

ARTS4ALL, LTD.,
Petitioner,

v.

JUDITH L. HANCOCK,
Respondent.

On Petition for Writ of Certiorari to the State of New York Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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December 7, 2009

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QUESTIONS PRESENTED

Due process of law requires notice and a meaningful opportunity to be heard at a meaningful time and in a meaningful manner. Dismissal, on the merits, for refusal to obey a disclosure order impossible of compliance following disclosure in good faith violates due process of law. The trial court found this litigation vexatious and ordered petitioner's action dismissed, on the merits, for refusal to obey two disclosure orders. Petitioner first received notice it refused to obey those disclosure orders in the decision which ordered dismissal. On the first disclosure order, by statute, no disclosure by petitioner is due. The second disclosure order does not exist. Petitioner complied with disclosure copiously; absent from the dismissal decision is any disclosure by petitioner not made and any reference to that compliance. The intermediate appellate court echoed the trial court's vexation and affirmed for refusal to obey a third order, described as made pursuant to the business corporation law, but which does not exist. Petitioner first received notice that it refused to obey this third order in the decision which affirmed dismissal. The state court of last resort affirmed on "all of the facts and circumstances in the case", which it did not disclose, based on a review not circumscribed by the affirmed findings made by the courts below. The jurisdiction of that state court of last resort is circumscribed by those findings; petitioner's appeal to that state court of last resort is based on those findings.

The questions presented on this appeal are:

Whether an affirmance by a state court of last resort on "all of the facts and circumstances of the case", never disclosed, not limited to the affirmed findings made by the courts below, from which appeal is taken, violates due process of law.

Whether an affirmance by a state court of last resort of a dismissal on the merits where first notice of a finding of a refusal to obey an order is made in the decision which affirms that dismissal violates due process of law.

Whether an affirmance of a dismissal on the merits by a state court of last resort for a refusal to obey an order first found to exist on appeal violates due process of law.

Whether an affirmance of a dismissal on the merits by a state court of last resort for a refusal to obey a disclosure order where there is compliance with disclosure and no refusal to obey a disclosure order violates due process of law.

Whether an affirmance of a dismissal on the merits by a state court of last resort of a refusal to obey disclosure orders first found in the decision which orders dismissal based on that finding violates due process of law.

Whether an affirmance of a dismissal on the merits by a state court of last resort of refusal to obey two disclosure orders, the first, by statute impossible to disobey, and the second non-existent, violates due process of law.

Whether an affirmance of a dismissal on the merits by a state court of last resort for failure to obey a disclosure order where there is compliance with disclosure and no refusal to obey a disclosure order violates due process of law.

Rule 29.6 STATEMENT

Petitioner Arts4All, Ltd. is a Delaware corporation. There is no parent or publicly held company which owns 10% or more of petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arts4All, Ltd. respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York.

OPINIONS BELOW

The Supreme Court, State of New York ["supreme court"] decision (App. E, *infra*, 30a) which dismissed petitioner's pleading, is not reported. The Supreme Court Appellate Division, First Judicial Department, State of New York ["appellate division"] decision (App. D, *infra*, 12a) which affirmed is reported at 54 A.D.3d 286, 863 N.Y.S.2d 193 (1st Dept. 2008). The appellate division decision (App. C, *infra*, 10a) which granted permission to appeal is reported at 2008 NYSlipOp 89302(U). The Court of Appeals, State of New York, ["court of appeals"] decision (App. A, *infra*, 1a) which affirmed is reported at 12 N.Y.3d 846, 909 N.E.2d 83 (2009). The court of appeals decision (App. Y, *infra*, 118a) which denied reargument is reported at 13 N.Y.3d 762, 915 N.E.2d 1158 (2009).

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2009. The decision of the court of appeals which denied reargument was entered on September 8, 2009. This Court's jurisdiction is invoked to review a decision by a state court of last resort which decided an important federal question, due process of law, in a manner which conflicts with relevant decisions by this Court. 28 U.S.C. § 1257(a); Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

"No person shall be... deprived of life, liberty, or property, without due process of law..."

Amendment 14

SECTION 1

"No State shall... deprive any person of life, liberty, or property, without due process of law..."

CONSTITUTION OF THE STATE OF NEW YORK

Article I

SECTION 6

"No person shall be deprived of life, liberty or property without due process of law." McKinney's NY Const. Art. I, § 6 (West 2009)

Article VI

SECTION 3

"a. The jurisdiction of the court of appeals shall be limited to the review of questions of law..." McKinney's NY Const. Art. VI, § 3 (West 2009)

NEW YORK STATE STATUTES

Civil Practice Law and Rules

"§ 5501. Scope of review

***

(b) Court of appeals. The court of appeals shall review questions of law only..."Mckinney's Cons. Laws of NY (West 2009)

"Rule 3124. Failure to disclose; motion to compel disclosure.

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article...the party seeking disclosure may move to compel compliance or a response." Mckinney's Cons. Laws of NY (West 2009)

"§ 3126. Penalties for refusal to comply with order or to disclose.

"If any party... refuses to obey an order for disclosure or willfully fails to . disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

***

3. an order... dismissing the action..." Mckinney's Cons. Laws of NY (West 2009)

STATEMENT OF THE CASE

Factual Background

Petitioner is a Delaware corporation authorized to do business in New York in the business of providing proprietary platforms for quality interactive video/sound for cultural content. Petitioner's potential customers are schools and colleges and the intended recipients of its content include children, young adults, and teachers. Respondent is petitioner's former general counsel and a minority shareholder who claims New York residency.

Respondent, after termination for cause, admits sending a memorandum, anonymously, to Ohio officials, in the guise of an Ohio resident, suggesting that petitioner is a fraud. A joint arts initiative with Ohio, which would have given school children and teachers without access, because of their means, access to New York's Broadway theatre, concerts, and other rich cultural content, was destroyed.

Procedural Background

On January 24, 2003, petitioner commenced this action against respondent for breach of a release. On February 27, 2003, respondent counterclaimed first for wrongful termination and, next, by amended counterclaims, as an aggrieved shareholder as well.

By August 5, 2005, petitioner had served respondent with four (4) CPLR 3107 notices to take deposition upon oral examination, two (2) CPLR 3130 demands for answers to written interrogatories and one (1) CPLR 3120 document inspection demand.

Respondent had never appeared for a single deposition, answered a single interrogatory, or served a single scrap of paper. (App. P, *infra*, 71a)

By CPLR disclosure order dated August 5, 2005, on petitioner's motion, the supreme court ordered respondent to comply with petitioner's CPLR disclosure devices by dates certain or show cause why respondent refused to obey. Respondent refused to obey. (App. P, *infra*, 71a)

By decision and order, dated September 29, 2005, the supreme court granted petitioner's motion and ordered all CPLR disclosure completed within thirty (30) days, by October 29, 2005, and lifted all stays on CPLR disclosure but did not abbreviate the statutory periods within which to respond to CPLR disclosure devices. (App. M, *infra*, 61a) Respondent had never served a single CPLR Art. 31 disclosure device.

On October 14, 2005, just fifteen (15) days prior to the October 29, 2005 deadline, respondent served petitioner, for the first time, with a CPLR Art. 31 disclosure device: a CPLR 3120 document inspection demand. By statute, no response to this demand is overdue until after the October 29, 2005 deadline.

On October 18, 2005, just eleven (11) days prior to the October 29, 2005 deadline, respondent served petitioner, for the first time, with CPLR 3130 written interrogatories. By statute, no response to this demand is overdue until after the October 29, 2005 deadline. These interrogatories are a legal nullity: by petitioner's sworn admission, the interrogatories were never read by the attorney of record prior to their service, were never signed by an attorney, and were signed and served by a clerk at that attorney's direction.

On October 24, 2005, just five (5) days prior to the October 29, 2005 deadline, respondent served petitioner for the first time with multiple CPLR 3107 notices to take its deposition upon oral examination. By statute, no appearance is required until after the October 29, 2005 deadline.

On November 17, 2005, petitioner sought a protective order from the disclosure demanded by the CPLR 3120 notice, rendered overly broad and prolix by "definitions", the use of conjunctions, and by the demands themselves. On November 18, 2005, the supreme court issued a protective order which required petitioner to provide only e-mail in which respondent's name appeared.

Petitioner timely provided 6,223 pages of documents, timely provided answers – over objection – to the respondent's interrogatories and appeared for all depositions which lasted not for hours but for days.

By disclosure scheduling order, the supreme court repeatedly adjourned the date for the filing of the note of issue to permit CPLR disclosure to be completed. (App. G, H, *infra*, 47a, 49a)

By docketing order, dated January 6, 2006, the supreme court directed the note of issue filed on January 13, 2006. (App. G, *infra*, 47a)

On January 13, 2006, petitioner filed the note of issue. (App. Z, *infra*, 121a)

On March 15, 2006, respondent made a CPLR 3126(3) motion to dismiss petitioner's action for failure to comply with CPLR disclosure.

A CPLR 3124 motion on notice to compel petitioner to comply with CPLR disclosure was never made.

On May 11, 2006, during oral argument on the respondent's CPLR 3126(3) motion, the supreme court issued a decisional order that the respondent's CPLR 3126(3) motion would be denied. (App. AA, *infra*, 126a)

May 11, 2006 Minutes of Proceedings
Page 7, Line 24 to Page 8, Line 5

> "THE COURT: Likewise, Ms. Hancock, is there anything you do not understand about the Court's unwillingness to dismiss the one remaining cause of action of plaintiff? Is there anything that is not clear to you with respect to the Court's order?
>
> MR. TRACHTENBERG:[1] Your Honor, your order is entirely clear..." (App. AA, *infra*, 126a)

By decision dated July 11, 2006, the supreme court ordered CPLR 3126(3) dismissal of petitioner's action for refusal to obey two CPLR disclosure orders, dated September 29, 2005 and November 1, 2005. (App. E, *infra*, 30a)

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[1] The respondent's attorney of record.

The CPLR September 29, 2005 disclosure order is the order on the petitioner's motion to compel respondent to comply with petitioner's CPLR disclosure devices by dates certain. (App. P, *infra*, 71a) Respondent never served a CPLR disclosure device prior to October 14, 2005. The CPLR September 29, 2005 disclosure order does not appear in the notice for respondent's CPLR 3126(3) motion. No argument is made by the respondent in the papers in support of CPLR 3126(3) dismissal that petitioner refused to obey the September 29, 2005 order.

By statute, no CPLR disclosure was due by petitioner by the October 29, 2005 deadline for completion of CPLR disclosure set by the September 29, 2005 disclosure order. This, because respondent's service of CPLR disclosure devices was first made more than two weeks after the September 29, 2005 order.

In the July 11, 2006 decision, the supreme court said that by the CPLR November 1, 2005 disclosure order, it found that petitioner had not complied with "certain aspects" of the CPLR September 29, 2005 disclosure order. Absent from the decision is any identification of what those "certain aspects" are. (App. E, *infra*, 30a)

No CPLR November 1, 2005 disclosure order exists.

In the July 11, 2006 decision, the supreme court said that it admonished both parties at proceedings held on November 1, 2005 for failure to move forward with disclosure. (App. E, *infra*, 30a) There are no November 1, 2005 proceedings. There were proceedings on October 31, 2005, but no CPLR Art. 31

disclosure was due from petitioner until after October 31, 2005.

In the July 11, 2006 decision, the supreme court said that during proceedings on September 25, 2005, it admonished both parties for failure to move disclosure forward. (App. E, *infra*, 30a) There are no September 25, 2005 proceedings. There were proceedings on September 29, 2005, but no CPLR Art. 31 disclosure was due from petitioner on September 29, 2005 because respondent had yet to serve CPLR disclosure devices, then more than two and a half years after the commencement of the action and respondent's counterclaims.

In the July 11, 2006 decision, the supreme court said that it had denied a motion for contempt to enforce a May 19, 2005 order, based on a shareholder demand. (App. E, *infra*, 30a) This order was entered, not dated May 19, 2005, and as hereinafter discussed its content is not the same as the content of the BCL June 8, 2005 order as it is described by the appellate division. (App. D, E, Q, *infra*, 12a, 30a, 76a)

Absent from the July 11, 2006 decision any finding by the supreme court of any CPLR disclosure which petitioner did not provide: there is no finding that petitioner failed to produce documents; failed to appear for depositions; or failed to answer interrogatories in a timely or proper manner. (App. E, *infra*, 30a)

First notice by the supreme court that it had found that petitioner refused to obey the existent CPLR September 29, 2005 disclosure order and the non-existent CPLR November 1, 2005 disclosure order was given to petitioner by the supreme court in the July 11, 2006 decision which ordered CPLR 3126(3) dismissal of petitioner's action based on that finding of refusal. (App. E-X, *infra*, 30a-115a)

Petitioner had also argued in opposition to the respondent's CPLR 3126(3) motion that a demand for answers to interrogatories unlawfully made, as neither prepared nor signed by the attorney of record, or signed by any attorney at all, the latter defect never cured, cannot be the basis for CPLR 3126(3) dismissal because it is impossible for the burden of proof to have been met based on that order. The supreme court did not address this argument. (App. E, *infra*, 30a)

Petitioner appealed to the appellate division the supreme court's CPLR 3126(3) dismissal of its action, on the merits. On appeal, petitioner argued that: it is impossible for petitioner to have refused to comply with the CPLR September 29, 2005 disclosure order when, by statute, no disclosure by petitioner was due on that CPLR disclosure order; that the CPLR November 1, 2005 disclosure order, which does not exist, is impossible of compliance; that petitioner did not refuse to obey any CPLR disclosure order; and that, by petitioner there is total compliance with CPLR disclosure and therefore no willful, contumacious or bad faith conduct which resulted in a failure to disclose.

By decision, dated August 26, 2008, the appellate division, in an opinion in which three justices joined and from which two justices dissented, affirmed the CPLR 3126(3) dismissal, on the merits, for refusal to comply with a CPLR disclosure order, based on a third order, which it described as a BCL order, dated June

8, 2005, based on a refusal to comply with a shareholder demand. (App. D, *infra*, 12a)

No BCL June 8, 2005 order exists and petitioner was served, for the first time, with a CPLR disclosure device on October 14, 2005, more than four (4) months after the date of the non-existent BCL June 8, 2005 order.

The appellate division found that on May 11, 2006, when the supreme court said its order would be that respondent's CPLR 3126(3) motion would be denied, petitioner should have known that the supreme court did not mean what it said. (App. D, *infra*, 12a)

The appellate division also quoted the admonishment by the lower court, during the September 29, 2005 proceedings, of both parties for failure to move forward with disclosure. (App. D, *infra*, 12a) Again, as of September 29, 2005, petitioner had never been served with a CPLR disclosure device, then more than two and a half years after the commencement of the action and counterclaims. On October 14, 2005, petitioner was served with respondent's first CPLR Art. 31 disclosure device.

The appellate division found that by the BCL June 8, 2005 order, the supreme court ordered petitioner to produce videotapes, and that petitioner had repeatedly refused. (App. D, *infra*, 12a) Respondent's CPLR 3120 notice, first served on October 14, 2005, never demands the production of videotapes; the only event recorded in this case is an annual shareholder meeting, which took place on December 28, 2005, six (6) months after the BCL June 8, 2005 order was found issued. Absent from the May 19, 2005 order, entered on June 8, 2005, is any reference to videotapes. (App. Q, *infra*, 76a)

The appellate division found that by the BCL June 8, 2005 order, the supreme court had ordered the production of financial statements and that petitioner had refused based on its May 19, 2005 order, made on a shareholder demand. (App. D, *infra*, 12a) Before the supreme court at the time of its July 11, 2006 decision was an affidavit by the certified public accountant who prepared petitioner's financial statements which established that all financial statements ordered produced by the May 19, 2005 "order" had been produced and further compliance impossible because of records in the possession of third parties not within petitioner's control. (App. AB, *infra*, 129a, 160a)

The appellate division said that by the BCL June 8, 2005 order, the supreme court directed the production of the items on "Schedule J" and petitioner refused. (App. D, *infra*, 12a) On October 14, 2005, petitioner was served for the first time with a CPLR disclosure device; respondent never made a motion to compel CPLR disclosure; and "Schedule J" was created in March 2006 for the CPLR 3126(3) motion.

The appellate division affirmed CPLR 3126(3) dismissal on the finding made for the first time on appeal that petitioner engaged in willful misrepresentation by certifying on the note of issue CPLR disclosure was complete. This, because petitioner had refused to obey the BCL June 8, 2005 order. (App. D, *infra*, 12a) The note of issue does not require that a corporation certify compliance with BCL shareholder demands. (App. Z, *infra*, 124a) A note of issue is not a CPLR disclosure device or a CPLR disclosure order. (App. Z, *infra*, 121a)

The appellate division also affirmed CPLR 3126(3) dismissal on the finding that petitioner engaged in dilatory conduct by filing the note of issue on the date it was filed. This, because petitioner had refused to obey the BCL June 8, 2005 order. (App. D, *infra*, 12a) The supreme court ordered petitioner to file the note of issue on the date it was filed. (App. G, *infra*, 47a) The filing of a note of issue is not a response to a CPLR disclosure device. (App. G, H, *infra*, 47a, 49a)

Absent from the decision of the appellate division affirming CPLR 3126(3) dismissal for failure to obey the BCL June 8, 2005 order is any mention of the copious CPLR disclosure provided by petitioner at enormous cost. (App. D, *infra*, 12a)

Absent from the decision of the appellate division is any finding that petitioner refused to produce CPLR disclosure in response to any CPLR disclosure device; refused to answer interrogatories; and refused to appear for all depositions. (App. D, *infra*, 12a)

Petitioner also argued that a demand for answers to interrogatories unlawfully made cannot be the basis for CPLR 3126(3) dismissal because it is impossible for the burden of proof to have been met based on that order. The appellate division did not address this argument. (App. D, *infra*, 12a)

Petitioner moved for reargument of the August 26, 2008 decision of the appellate division, or, in the alternative, for permission to appeal to the court of appeals. On reargument, petitioner argued that it was denied due process of law because it received no prior notice that dismissal was imminent; petitioner did not refuse to obey a CPLR disclosure order; that by petitioner there was complete compliance with CPLR disclosure and, therefore, no willful, contumacious or bad faith conduct which resulted in a failure to disclose; and that an order which does not exist is impossible of refusal and compliance. Petitioner additionally argued that, by statute, a CPLR 3126(3) dismissal must be ordered based on a refusal to comply with a CPLR disclosure order and that the BCL June 8, 2005 order, albeit non-existent, is not a CPLR disclosure order. Petitioner also argued that a demand for answers to interrogatories unlawfully made cannot be the basis for CPLR 3126(3) dismissal because it is impossible for the burden of proof to have been met based on that order.

By decision and order, dated November 18, 2008, the appellate division, *per curiam*, denied reargument but granted permission to appeal to the court of appeals on the question, which it certified, of whether its decision was properly made. (App. C, *infra*, 10a)

Petitioner appealed to the Court of Appeals on the basis of denial of due process of law. Petitioner argued that the decision of the appellate division violated due process of law because it affirmed CPLR 3126(3) dismissal based on a BCL order which does not exist. Petitioner additionally argued that due process of law was denied because there was no warning of imminent CPLR 3126(3) dismissal because there was no prior CPLR disclosure order made pursuant to CPLR 3124 directing that disclosure be made, a requirement incorporated by New York decisional authority into CPLR 3126(3); total compliance by petitioner with

CPLR disclosure; and therefore no willful, contumacious or bad faith refusal to disclose. Petitioner additionally iterated the argument made before the appellate division that interrogatories unlawfully made cannot be the basis for CPLR 3126(3) dismissal.

By May 12, 2009 order, the court of appeals affirmed, on the law, based on a review not limited to the affirmed findings made by the courts below, but based on a review of the record in its entirety, "all of the facts and circumstances of the case" before the courts below. The court of appeals relied on its prior precedent, Kihl v. Pfeffer, 94 N.Y.2d 118, 722 N.E.2d 55 (1999). The court of appeals memorandum says:

> "The courts below applied the correct legal standards, properly considered all the facts and circumstances of the case, and did not abuse their discretion in dismissing the plaintiffs'[2] [sic] remaining cause of action pursuant to CPLR 3126(3). Kihl v. Pfeffer, 94 N.Y.2d 118 (1999)." (App. A, *infra*, 1a)

Petitioner thereafter moved for reargument of the May 12, 2009 decision, and, upon the grant of reargument, reversal on the basis of denial of due process of law. Petitioner argued that on the affirmed findings by the courts below, petitioner was denied notice of what CPLR disclosure petitioner did not provide; that affirmance of CPLR 3126(3) dismissal is based on a non-existent BCL June 8, 2005 order incapable of refusal and compliance; that on the affirmed facts, first notice that the supreme court found it refused to obey CPLR disclosure orders is in the decision which ordered CPLR 3126(3) dismissal on those orders; and that on the affirmed facts, first notice that the appellate division had found petitioner had refused to obey the non-existent BCL June 8, 2005 order, on which CPLR 3126(3) dismissal is affirmed, is by the decision which affirmed CPLR 3126(3) dismissal on that order.

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[2] Petitioner is the only party on the remaining cause of action.

By memorandum decision and order, dated September 8, 2009, reargument was denied. (App. Y, *infra*, 118a)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BY THE STATE COURT OF LAST RESORT CONFLICTS WITH THE DECISIONS OF THIS COURT ON AN IMPORTANT FEDERAL QUESTION.

Due process is a constitutional brake on the enforcement by courts of their own valid processes when these operate to deny a party an opportunity for a hearing on the merits of their case. Logan v. Zimmerman Brush Company, 455 U.S. 422, 429 (1982); Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958). Dismissal as a punishment for failure to obey a court order, without a hearing on a party's cause, is a denial of due process of law. Hammond Packing Company v. State of Arkansas, 212 U.S. 322, 350-351 (1909); Hovey v. Elliott, 167 U.S. 409, 413-414, 417-418 (1897); Windsor v. McVeigh, 93 U.S. 277-278 (1876)

Fourteenth Amendment due process protections are violated where a person in jeopardy of serious loss receives no notice of the case against them and is denied an opportunity to be heard at a meaningful time and in a meaningful manner. Additionally, those due process protections are violated by a dismissal where there is compliance with disclosure, because that compliance destroys the permissible presumption that the refusal to produce material evidence is an admission of lack of merit. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 705-706 (1982); Fuentes v. Shevin, 407 U.S. 67, 80, 81 (1972); Boddie v. Connecticut, 401 U.S. 371, 377-379 (1971); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. at 209; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (1951); Windsor v. McVeigh, 93 U.S. at 277-278

Fifth Amendment due process protections are denied by the striking of a complaint because of a plaintiff's inability to comply with a pretrial production order, despite good faith efforts. Logan v. Zimmerman Brush Company, 455 U.S. at 429-430; Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. at 210-212.

In Fuentes v. Shevin, supra, this Court said:

> "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply

> mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights...(And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss of notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 at 170-172, Frankfurter, J., concurring)
>
> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented..." 407 U.S. at 81

In Windsor v. McVeigh, supra, this Court said:

> "A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case, the District Court not only, in effect said this, but immediately added a decree of condemnation... it is difficult to speak of a decree thus rendered with moderation; it was, in fact,

> a mere arbitrary edict, clothed in the form of a judicial sentence." 93 U.S. at 277-278

In Hovey v. Elliott, this Court said:

> "The fundamental conception of a court of justice is condemnation only after a hearing...to render decrees without any hearing whatsoever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." 167 U.S. at 413-414

Notice of a refusal to obey a disclosure order first given in a subsequent order which directs dismissal based on that finding is incapable of prior receipt. Meaningful opportunity to be heard on appeal is denied when an appellate court affirms based on an order first found on appeal when appellant's argument on appeal is limited to the findings in the court below from which appeal is taken.

The court of appeals affirmance of the dismissal on the merits of petitioner's cause violates due process of law because by that decision petitioner was denied notice and a meaningful opportunity to be heard, at a meaningful time, and in a meaningful manner. That which is before this Court is the equivalent of finding an individual guilty of a crime for which they were never arrested, charged, convicted and sentenced on appeal from a wrongful conviction for another crime.

In CPLR disclosure petitioner provided 6,223 pages of documents, answered interrogatories, and appeared for all depositions. No motion was ever made to compel petitioner to comply with CPLR disclosure.

The court of appeals decision does not disclose the findings on which it affirms, to include the CPLR disclosure order which petitioner refused to obey, the statutory predicate for CPLR 3126(3) dismissal. Instead, the court of appeals affirms on "all of the facts and circumstances in the case" before the courts below, not limited to the specific findings made by those courts. The only inference which can be drawn as to those findings on which the court of appeals relies is its citation to Kihl v. Pfeffer, supra, a case in which an order directed further answers to interrogatories. In the case at bar, there is no such order and the interrogatories are a legal nullity as never prepared or read by the attorney of record or signed by an attorney, but signed and served by a clerk. Determinations which deprive a party of its rights made in secret and never disclosed deny fundamental fairness and due process of law.

The appellate division affirmed CPLR 3126(3) dismissal for refusal to obey a CPLR disclosure order based on a BCL June 8, 2005 order, described as based on a shareholder demand, which it found petitioner refused to obey for the first time on appeal, but which BCL order does not exist. Additionally, based on the refusal to obey that BCL June 8, 2005 order, willful misrepresentation by certification on a note of issue that CPLR disclosure was complete and dilatory conduct by its filing was found for the first time by the appellate court, but never found by the supreme court.

The first notice that petitioner received that it had refused to obey the BCL June 8, 2005 order is the decision which affirmed dismissal based on refusal to obey that order. No meaningful opportunity to be heard on appeal was afforded petitioner to argue that the BCL June 8, 2005 order cannot be the basis for CPLR 3126(3) dismissal, because petitioner's arguments were based on the findings made by the supreme court, from which it appealed.

Had petitioner been given an opportunity to be heard, petitioner could have argued that CPLR 3126(3) dismissal is available exclusively for refusal to obey an order made pursuant to the CPLR disclosure article; a note of issue does not require a corporation to certify compliance with shareholder demands but only with CPLR disclosure; and that the note of issue was filed, when it was filed, by order of the supreme court. Argument could additionally have been made that a refusal to obey a BCL order, made on June 8, 2005, cannot be a refusal to obey a CPLR disclosure order when the first CPLR disclosure demand was served on petitioner on October 14, 2005, four (4) months after the date of the BCL June 8, 2005 order, whether or not that BCL order exists. Due process was additionally denied because by petitioner there is total compliance with disclosure: there is no willful, contumacious or bad faith failure to comply with disclosure and dismissal is a denial of due process of law.

The first notice that petitioner received that it had refused to obey the CPLR September 29, 2005 disclosure order, and the CPLR November 1, 2005 disclosure order, which does not exist, was made in the supreme court decision which dismissed for refusal to comply with those orders.

Had petitioner been given an opportunity to be heard, petitioner could have argued that notice of imminent CPLR 3126(3) dismissal was not given by the supreme court's order, made on the date of submission, that the motion to dismiss would be denied; that petitioner is incapable of refusal to provide disclosure on the CPLR September 29, 2005 disclosure order because it set a deadline by which no disclosure, by statute, by petitioner, was due; and the CPLR November 1, 2005 disclosure order does not exist and is therefore incapable of compliance. Due process was additionally denied because by petitioner there is total compliance with disclosure: there is no willful contumacious or bad faith failure to comply with disclosure and dismissal is a denial of due process of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Counsel of Record
Law Offices of
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APPENDIX

APPENDIX A

State of New York
Court of Appeals

No. 121 SSM 10

[Filed May 12, 2009]

Arts4All, Ltd.,)
Appellant,)
et al. ,)
Plaintiff,)
v.)
Judith L. Hancock,)
Respondent.)
)
Judith L. Hancock,)
Third-Party Respondent,)
v.)
Daniel Y.C. Ng, et al.,)
Third-Party Defendants.)
)

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

Submitted by Zachary R. Greenhill, for appellant.
Submitted by David G. Trachtenberg, for respondent.

MEMORANDUM:

The order of the Appellate Division, insofar as appealed from, should be affirmed, with costs, and the certified question not answered as unnecessary.

The courts below applied the correct legal standards, properly considered all the facts and circumstances of the case, and did not abuse their discretion in dismissing plaintiffs' remaining cause of action pursuant to CPLR 3126 (3) (see Kihl v Pfeffer, 94 NY2d 118, 123 [1999]).

* * * * * * * * * * * * * * * * *

On review of submissions pursuant to section 500.11 of the Rules, order, insofar as appealed from, affirmed, with costs, and certified question not answered as unnecessary, in a memorandum. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur. Chief Judge Lippman took no part.

Decided May 12, 2009

State of New York
Court of Appeals

No. 121 SSM 10

[Dated May 12, 2009]

HON. CARMEN BEAUCHAMP CIPARICK, *Senior Associate Judge, presiding.*

Remittitur

Arts4All, Ltd.,)
Appellant,)
et al.,)
Plaintiff,)
v.)
Judith L. Hancock,)
Respondent.)
)
Judith L. Hancock,)
Third-Party Respondent,)
v.)
Daniel Y.C. Ng, et al.,)
Third-Party Defendants.)
)

Appellant in the above entitled appeal appeared by Zachary R. Greenhill, Esq.; respondent appeared by Trachtenberg Rodes & Friedberg, LLP.

The Court, after due deliberation, orders and adjudges that on review of submissions pursuant to section 500.11 of the Rules, the order, insofar as appealed from, is affirmed, with costs, and certified question not answered as unnecessary, in a memorandum. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur. Chief Judge Lippman took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Stuart M. Cohen
Stuart M. Cohen, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 12, 2009

State of New York
Court of Appeals

Stuart M. Cohen *Clerk's Office*
Clerk of the Court *Albany, New York 12207-1095*

No. 121 SSM 10

[Decided May 12, 2009]

Arts4All, Ltd.,)
Appellant,)
et al.,)
Plaintiff,)
v.)
Judith L. Hancock,)
Respondent.)
)
Judith L. Hancock,)
Third-Party Respondent,)
v.)
Daniel Y.C. Ng, et al.,)
Third-Party Defendants.)
)

On review of submissions pursuant to section 500.11 of the Rules, order, insofar as appealed from, affirmed, with costs, and certified question not answered as unnecessary, in a memorandum. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Chief Judge Lippman took no part.

APPENDIX B

State of New York
Court of Appeals

Stuart M. Cohen — *Clerk's Office*
Clerk of the Court — *Albany, New York 12207-1095*

Mo. No. 2008-1153

[Decided January 15, 2009]

Arts4All, Ltd.,)
Appellant-Respondent,)
et al.,)
Plaintiff,)
v.)
Judith L. Hancock,)
Respondent-Appellant.)
)
Judith L. Hancock,)
Third-Party Respondent,)
v.)
Daniel Y.C. Ng, et al.,)
Third-Party Defendants.)
)

Motion by Arts4All, Ltd. to dismiss the appeal taken as of right by Hancock granted and the appeal dismissed, without costs, upon the ground that the two-justice dissent is not on a question of law and no substantial constitutional question is directly involved.

On the Court's own motion, appeal taken as of right by Arts4All dismissed, without costs, upon the ground that the two-justice dissent is not on a question of law.

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of January, 2009

Present, HON. CARMEN BEAUCHAMP CIPARICK, *Acting Chief Judge, **presiding**.*

Mo. No. 1153

Arts4All, Ltd.,)
Appellant-Respondent,)
et al.,)
Plaintiff,)
v.)
Judith L. Hancock,)
Respondent-Appellant.)
)
Judith L. Hancock,)
Third-Party Respondent,)
v.)
Daniel Y.C. Ng, et al.,)
Third-Party Defendants.)
)

Arts4All, Ltd. and Judith L. Hancock having filed notices of appeal and Arts4All, Ltd. having filed a motion to dismiss the appeal taken as of right by Hancock in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion by Arts4All, Ltd. to dismiss the appeal taken as of right by Hancock be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that the two-justice dissent is not on a question of law and no substantial constitutional question is directly involved; and it is

ORDERED, on the Court's own motion, that the appeal taken as of right by Arts4All be and the same hereby is dismissed, without costs, upon the ground that the two-justice dissent is not on a question of law.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX C

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on November 18, 2008.

Present - Hon. Peter Tom, Justice Presiding,
Eugene Nardelli
Milton L. Williams
James M. McGuire
Karla Moskowitz, Justices.

M-4711
Index No. 101123/03

Arts4All, Ltd., et al.,)
Plaintiffs-Respondents-Appellants,)
)
-against-)
)
Judith L. Hancock,)
Defendant-Appellant-Respondent.)

)
Judith L. Hancock)
Counterclaim Plaintiff-Appellant-)
Respondent,)
)
-against-)
)
Daniel YC Ng, et al.,)
Additional Defendants)
on the Counterclaims,)

Peter Osgood,)
Additional Defendant on the)
Counterclaims-Respondent-)
Appellant.)
_____________________________)

Plaintiff-appellant Arts4All, Ltd. having moved for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on August 26, 2008 (Appeal No. 2800 [M-120]),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion, to the extent that it seeks reargument, is denied. To the extent that the motion seeks leave to appeal to the Court of Appeals, the motion is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought be reviewed by the Court of Appeals:

> "Was the order of this Court, which affirmed the order of the Supreme Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

/s/
Clerk

APPENDIX D

Supreme Court, Appellate Division, First Department.

Tom, J.P., Nardelli, Williams, McGuire, Moskowitz, JJ.

2800
Index 101123/03

[Dated August 26, 2008]

Arts4All, Ltd., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Judith L. Hancock,
Defendant-Appellant-Respondent.

Judith L. Hancock
Counterclaim Plaintiff-Appellant-Respondent,

-against-

Daniel YC Ng, et al.,
Additional Defendants
on the Counterclaims,

Peter Osgood,
Additional Defendant on the

Counterclaims-Respondent-)
Appellant.)
)

Judith L. Hancock, New York, appellant pro se.

Law Offices of Zachary R. Greenhill, P.C., New York (Zachary R. Greenhill of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered July 25, 2006, which dismissed plaintiffs' remaining cause of action and defendant's counterclaims for failure to comply with discovery and effectively denied defendant's request for signed transcripts, affirmed, without costs. Appeal from the October 31, 2005 ruling imposing sanctions against defendant dismissed, without costs.

Supreme Court providently exercised its discretion to strike the pleadings (CPLR 3126[3]). The parties have offered no excuse for their repeated noncompliance with the court's disclosure orders, and their conduct throughout the course of this litigation has been "dilatory, evasive, obstructive and ultimately contumacious" (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374 [1990]). It is a "court's prerogative to control its calendar and expeditiously dispose of the volume of cases before it" (*People v Alston*, 191 AD2d 176, 177 [1993]; *see also Kriger v Holland Furnace Co.*, 12 AD2d 44, 46 [1960]). Appellate courts have recognized that, under the Individual Assignment System, substantial deference should be accorded to the trial court's considerable discretion to compel compliance with discovery orders, and, absent clear abuse, a penalty imposed in accordance with CPLR 3126 should not readily be disturbed (*see Sawh v Bridges*, 120 AD2d 74, 79 [1986], *appeal dismissed* 69 NY2d 852 [1987]). The public policy favoring resolution of cases on their merits is not promoted by permitting a party to a single such matter to impose an undue burden on judicial resources to the detriment of all other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it (*cf. id.* at 80).

The record, which reflects a personal animus between defendant and plaintiff Humphrey, amply demonstrates the parties' willful, contumacious defiance of court orders via excessive, frivolous and retaliatory motion practice involving disclosure and other issues. In this simple action for breach of the no-disparagement clause of a general release, the parties, in a relatively short period of time, interposed approximately 18 motions, several of which involved voluminous disclosure demands and charges of misconduct, improper disclosure requests and noncompliance with such demands. The court's September 29, 2005 order vacating all disclosure stays, admonishing both sides for their dilatory tactics and directing the parties to complete disclosure within 30 days, effectively afforded them the opportunity to begin anew. The parties' conduct, nevertheless, quickly segued into abuse despite the court's proactive efforts to provide a firm discovery schedule, a restriction on motion practice, rapid access to court assistance in resolving disputes, and progressive warnings and sanctions.

For example, over one year after it had been issued, plaintiffs still had not complied with the court's June 8, 2005 order enforcing defendant's shareholder inspection rights to certain videotapes, financial statements and other corporate documents (including items sought in defendant's Schedule J), notwithstanding the court's repeated reiteration of this directive. Thus, plaintiffs also engaged in willful misrepresentation and dilatory conduct when they filed a note of issue on January 13, 2006 stating that all disclosure had been completed. Several months later, on April 6, 2006, the court ordered the parties to its jury room and several hours were spent working out an agreement as to the Schedule J items, with some degree of success. But upon their return to court that same day, plaintiffs sought to renege on the agreement, informing the court that they would be filing a CPLR 3126 motion to strike defendant's amended counterclaims.

Defendant's response to the September 29, 2005 discovery order was to wait until nearly the mandated initial disclosure completion date, November 18, 2005, before serving her discovery responses together with voluminous discovery requests, thus rendering compliance with the court's order virtually impossible. Defendant filed a 45-page initial discovery response on October 19, 2005, a notice to admit facts on October 14, 2005, a notice to admit genuineness of documents (with 28 documents attached) on October 17, 2005, another notice to admit genuineness of documents (with 12 documents attached) on October 18, 2005, and her own notice of deposition on October 24, 2005.

Defendant failed to appear at the deposition scheduled for October 24, 2005. The record shows that when counsel was served with notice of the deposition, he requested that it be rescheduled due to, among other things, his observance of a religious holiday. Despite the court's denial of an adjournment, defendant defaulted in appearance. At the October 31, 2005 hearing in connection with the default, defendant's counsel informed the court that he had made an error, believing that October 24 was a Jewish holiday and only later learning that the holiday fell on October 25 and 26. Counsel apologized for creating the impression that "we have also played fast and loose with the Court." The court fined defendant $500 for her failure to appear at the deposition, and issued a briefly extended but more rigid disclosure schedule and a warning to both parties that further failure to adhere to the disclosure schedule would result in dismissal of the offending party's pleadings.

It is significant that both sides made motions pursuant to CPLR 3126 to strike each other's pleadings despite their own willful and contumacious disregard for the court's discovery orders - plaintiff did so on three separate occasions. Furthermore, the record indicates that the conduct at issue cannot be blamed solely on the parties' attorneys. As the court noted in the decision on appeal:

> "It is only upon listening to and observing the parties during oral argument and their utter lack of respect for each other that this Court came to its conclusion that the parties have no interest in resolving this dispute nor [to] allow the Court or a jury to do so, but instead are intent on using the court as a weapon to harass each other."

The motion court's finding that the parties' conduct was willful and contumacious is supported by the record, and "[i]t would not be appropriate, at bar, for this Court to substitute its discretion for that of the Justice sitting in the IAS Court" (*Spira v Antoine*, 191 AD2d 219, 219-220 [1993], citing *Sawh v Bridges*, 120 AD2d at 77). In view of the obstreperous, dilatory and evasive conduct engaged in by the parties, the motion court did not abuse its discretion in dismissing the complaint and the counterclaims. As stated by the Court of Appeals:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders . . . as are just,' including dismissal of an action (CPLR 3126) . . . [C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully" (*Kihl v Pfeffer*, 94 NY2d 118, 123)

Finally, the contention that the dismissals caught the parties unawares is without merit. Indeed, the record shows that from September 29, 2005 forward the court repeatedly warned the parties of the risk of having their pleadings dismissed for disclosure abuse. While it is true that, during the proceedings on April 6 and May 11, 2006, the court stated that it was not likely to dismiss pleadings, on the former date it granted plaintiffs permission to submit a CPLR 3126 motion and adjourned defendant's CPLR 3126 motion so as to make both returnable on May 11, 2006 for argument. At that time, the parties' final court appearance before the decision on appeal was entered, they vigorously argued for dismissal of each other's pleadings. The court noted with disgust that defendant's submission on its motion, contrary to the court's instructions, had been unnecessarily voluminous. The court also admonished plaintiff:

> "you know, you are not giving me any choices. I am going to have to dismiss your cause of action as a sanction for failure to abide by several court orders that this Court has issued. I mean, what else, what other choice do I have other than continuing with this game that you folks are playing?"

This heated proceeding ended with the court tersely withdrawing its order, issued earlier in the proceeding, directing that certain long-delayed disclosure be provided to defendants and stating that it would issue its decision within 60 days. Taken in context, these events clearly apprised the parties that the court, despite its expressed unwillingness to dismiss the pleadings, was considering such action based upon their conduct during disclosure. Thus, the parties were on notice that CPLR 3126 dismissal was a real option, the court's comments to the contrary notwithstanding.

Given the court's dismissal of the remainder of the parties' claims, it was not error to simultaneously decline to rule upon, and thus implicitly deny, defendant's request for signed transcripts of three oral, disclosure-related rulings rendered academic by the dismissals. One such ruling was the court's sua sponte imposition during oral argument on October 31, 2005 of a $500 sanction against defendant. Apart from being unappealable here because the transcript was not "so ordered" by the court (*see Matter of Grisi v Shainswit*, 119 AD2d 418, 420 [1986]), defendant's challenges lack merit. She erroneously asserts that the sanction, for noncompliance with a CPLR 3107 deposition notice, was improperly imposed since the notice was void on its face. CPLR 3107 provides, inter alia, that 20 days' notice shall be given for a deposition upon oral examination, "unless the court orders otherwise." Here, although only 13 days' notice was given, the record shows that the court considered and rejected defendant's request to revise the disclosure schedule prior to the deposition. Defendant also wrongly asserts that the court erred in imposing the sanction orally, in violation of 22 NYCRR 130-1.2. The record shows that the sanction was imposed pursuant to CPLR 3126, which is distinct from, and not subject to the constraints of, a sanction imposed under the Court's rules (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:11; *see also Hilley v Sanabria*, 12 AD3d 1188, 1189 [2004]).

We have considered and rejected the parties' remaining arguments for affirmative relief.

All concur except Nardelli and McGuire, JJ.
who dissent in a memorandum by McGuire, J.
as follows:

MCGUIRE, J. (dissenting)

In my view, Supreme Court erred in dismissing pursuant to CPLR 3126 plaintiffs' remaining cause of action and all of defendant's counterclaims since the drastic sanction of dismissal was not warranted. Accordingly, I would modify the July 25, 2006 order to impose against both sides the lesser sanction of terminating their respective rights to any further disclosure, reinstate the dismissed claims and remand the matter for a trial on the merits.

As we have recognized, '[b]ecause of the strong public policy in this State against limiting audience before the court, and in favor of resolving disputes on the merits, courts have reserved dismissal [under CPLR 3126] for rare cases where the extreme nature of the abuse warrants depriving a party of the opportunity to litigate the claim" (*Corsini v U-Haul Intl.*, 212 AD2d 288, 291 [1995] [citation omitted], *lv dismissed in part and denied in part*, 87 NY2d 964 [1996]), i.e., when the failure to disclose was willful, contumacious or due to bad faith (*e.g. Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222, 222 [2003]). Moreover, in reviewing disclosure sanctions we are guided by the principle that any such sanction should be commensurate with the nature and extent of the disobedience the sanction was designed to punish (*Weissman v 20 E. 9th St. Corp.*, 48 AD3d 242, 243 [2008]; *Christian v City of New York*, 269 AD2d 135, 137 [2000]; Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3126:8, at 462 [2005]).

By an order entered July 25, 2006, Supreme Court dismissed plaintiffs' remaining cause of action and defendant's counterclaims pursuant to CPLR 3126. While the record reflects the court's understandable frustration with the parties' extensive motion practice, until September 29, 2005, just 30 months after the filing of the first amended complaint in May 2003, there had been no suggestion from the court that the parties were risking a possible dismissal of their pleadings on account of their conduct. Indeed, the part of the court to which the case was originally assigned had dismissed the complaint under CPLR 3211 in an order entered September 25, 2003, and this court reinstated some of the causes of action in an order entered March 2, 2004 (5 AD3d 106). Furthermore, when defendant moved for summary judgment on July 28, 2005, a stay of disclosure went into effect pursuant to CPLR 3214(b). Thus, the window for disclosure had been effectively limited to the 17-month period between March 2, 2004 and July 28, 2005. In actuality, this period was even shorter since disclosure demands realistically could not have been sewed immediately upon the issuance of this Court's March 2, 2004 order reinstating some of the causes of action.

On September 29, 2005, Supreme Court, among other things, vacated the CPLR 3214(b) stay of disclosure, directed completion of all depositions within 30 days and ordered plaintiffs to file a note of issue by November 18, 2005. Only at that point did the court advise that it had "reached [its] limit" with the parties' motion practice, most of which, until that time, had involved motions to dismiss the various pleadings and for summary judgment and motions regarding plaintiffs' answer to defendant's counterclaims. This was the first time the parties were actually placed on notice of any kind of disclosure deadline.

Plaintiffs did not serve their notice for defendant's deposition until October 11, 2005, and then demanded that defendant appear on October 24, 2005, a notice period less than the 20 days provided by CPLR 3107. By letter dated October 17, 2005, defendant's counsel asked the court, among other things, to extend the disclosure deadline, and advised that he would not be available on October 24 because it was a religious holiday. The court notified defendant's counsel by letter that his request was denied, but the letter did not arrive at counsel's office until October 24. In the letter, however, the court advised that it was amenable to rescheduling the deposition if the attorneys could agree to do so. Thus, defendant's counsel called plaintiffs' counsel four times on October 24 in an effort to reschedule the deposition; none of defendant's counsel's calls were taken by plaintiffs' counsel and the calls were not returned. Defendant's counsel had also sent a letter on October 21 to plaintiffs' counsel requesting that the deposition be rescheduled from October 24 to October 27; plaintiffs' counsel did not respond to that letter, but advised the court that defendant had not appeared for the deposition. Notably, the requested reschedule date was within the 30-day time limit set by the court for completing depositions.

On October 31, the attorneys appeared before the court. Defendant's counsel advised the court that he had been mistaken in his belief that October 24 was a religious holiday. Defendant's counsel stated:

> "I had notified the Court I was unavailable that day. As I subsequently told [the justice's law clerk] I had made an error. I'm deeply embarrassed by it because I looked at my

> calendar and was confused as to which days the Jewish holidays were and thought I was unavailable on the 24 when in fact I was unavailable on the 25 and 26 ... I communicated this to [the justice's law clerk] as soon as I realized I made an error. I tried to tell [plaintiffs' counsel]."

During that appearance, the court fined defendant $500 for failing to appear for the deposition.

A matter of critical importance to the resolution of this appeal is that defendant's counsel's failure to appear with his client for the October 24 deposition was *not* by any means an instance of willful, contumacious or bad faith conduct. Notably, Supreme Court made no such finding in the course of imposing the $500 fine. Nor did Supreme Court find that defendant's counsel was not credible either when he expressed his embarrassment at his mistake or when he went on to represent to the court that he had notified the court's law clerk and had tried to contact plaintiffs' counsel. Indeed, plaintiffs' counsel has never disputed defendant's counsel's representations that he called plaintiffs' counsel four times on October 24 after having sent a letter to plaintiffs' counsel on October 21.

Not surprisingly, the majority does not purport to make its own finding of willful, contumacious or bad faith conduct in this regard. Even if there were some basis for making this finding, and there is not, defendant's failure to attend the deposition on October 24 would not warrant the striking of her counterclaims (*see Rodriguez v Sklar*, 56 AD2d 537, 538 [1977] [where there is some doubt whether a party's failure to appear for a deposition was willful the party should be permitted one last chance to appear to be deposed before the drastic sanction of striking the party's pleading is imposed]). Moreover, as the court recognized in its July 11, 2006 order, defendant did appear for a deposition at a later date. Thus, she was fined $500 for not having appeared initially, but her counterclaims nonetheless were dismissed even though she was eventually deposed *(see Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2008] ["Belated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct"]).

Contrary to the majority's conclusion, Supreme Court's finding that defendant engaged in willful and contumacious conduct warranting the dismissal of her counterclaims pursuant to CPLR 3126 is not supported by this record. Other than failing to appear for the October 24 deposition, the only other conduct by defendant specified by the majority was her serving disclosure requests several weeks before the initial November 18 target date for the close of disclosure. These requests were made in mid-October, only three weeks after the court issued the September 29 disclosure order, hardly an inordinate period of time, and nearly a month before the November 18 date specified in that order for the close of disclosure. Nothing in the September 29 order, moreover, required defendant to serve all her disclosure requests within one or two rather than three weeks of its issuance. Furthermore, in addition to trying to complete disclosure by the court's deadline, defendant's counsel was preparing defendant's brief and supplemental record for appeals and cross appeals from several of the court's orders in this action (25 AD3d 453 [2006], *lv dismissed* 6 NY3d 891 [2006]). Indeed, apparently recognizing the impracticality of its deadline, the court repeatedly extended the time for completing disclosure and filing a note of issue. The court ultimately set January 13, 2006 as the deadline for filing the note of issue; defendant filed the note of issue on that date but only did so because the court had so ordered. Nonetheless, disclosure continued through the spring of 2006.

Nor should plaintiffs' remaining cause of action have been dismissed. On April 6, 2006, as the majority notes, the parties gathered in the jury room for a lengthy period of time to discuss unresolved disclosure issues. When the parties returned to the courtroom, they advised that certain issues were still in dispute, although many had been resolved. After additional colloquy, the court determined that the remaining issues should be the subject of motions and the court set a briefing schedule. Plaintiffs did not, as the majority contends, "[seek] to renege" on matters on which the parties had already agreed. Rather, as the court itself stated, the jury room understandings "would still be an agreement." Thus, even at that late date, seven months after the court had advised the parties that it was reaching the limits of its patience, it gave no hint to the parties that the submission of further motions would place their pleadings in jeopardy. To the contrary, it conveyed the impression that the motions would clear the last obstacles to the close of disclosure.

The parties' conduct was simply not egregious enough to warrant the ultimate sanction of dismissal of all pleadings, which, as noted, "is appropriate only where the moving party demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Weissman*, 48 AD3d at 243; *see Christian*, 269 AD2d at 137; *Palmenta v Columbia University*, 266 AD2d 90, 91 [1999]). Again, the bulk of the disclosure in the case was completed, albeit belatedly, which further undermines the notion that the parties' conduct was willful or contumacious (*see Suh v Kim*, 51 AD3d 883 [2008] ; *Cambry, supra*; *Pascarelli v City of New York*, 16 AD3d 472 [2005]; *see also Carlos v 395 E 151st St.*, 41 AD3d 193 [2007]). Under the circumstances, the termination of disclosure and a trial on the merits would be a remedy commensurate with the parties' conduct (*see generally* CPLR 3126; *Torian v Lewis*, 90 AD2d 600, 601-602 [1982] ["The court has broad discretion ... in fashioning just remedies concerning failure to comply with a discovery order"]).[1]

The majority, however, apparently believes that the penalty of terminating disclosure and ordering the parties to trial is not more commensurate with the parties' conduct than the penalty of dismissal it affirms, despite the fact that a substantial amount of disclosure has been completed. By affirming the dismissal of plaintiffs' remaining cause of action and defendant's counterclaims at this stage of the litigation, the majority declares a judicial plague on the houses of both of these contentious Montagues and Capulets. The majority not only denies all parties a trial on the merits of their disputes, its decision results in a waste of the time, energy and resources of the parties and their attorneys, as well as a waste of the substantial judicial resources that have been devoted to this case.

---

[1] Another appropriate remedy would be to refer the matter to a referee for an abbreviated but comprehensively supervised disclosure process, with an understanding that the imposition of appropriate sanctions hung over the parties' heads (*see Lowitt v Korelitz*, 152 AD2d 506, 508 [1989]).

Contrary to the majority's suggestion, modifying Supreme Court's order to terminate disclosure and reinstate the remaining cause of action and the counterclaims, and remanding the matter for a trial, will not "undermin[e] the authority of the trial court to supervise the parties who appear before it." Rather, so modifying the order represents nothing more than a recognition that a trial judge may impose a penalty under CPLR 3126 that is not commensurate with the nature and extent of the disobedience the sanction was designed to punish, and we may modify such a penalty when we conclude that the trial court improvidently exercised its discretion. As Justice Bracken (joined by Justice Lazer) stated in rejecting the notion that the Appellate Division should only disturb a disclosure sanction imposed by Supreme Court where the court abused its discretion:

> "I must ... register my disagreement with my colleagues' conclusion that affirmance of the order dismissing the complaint is necessary in order to effectuate the expedient and efficient disposition of cases under the Individual Assignment System .... Although the statute (CPLR 3126) provides the trial court with broad discretion in fashioning penalties for failure to comply with discovery notices and orders, th[e] [Second Department] has not hesitated to act where, in our view, the imposition of a particular sanction by the trial court constituted an improvident exercise of its discretion. I am

> unable to find any evidence that the IAS was intended to abrogate or limit the power heretofore exercised by an intermediate appellate court to review discretionary rulings and, in appropriate cases to substitute its own discretion for that of a trial court" (*Sawh*, 120 AD2d 74, 82 [1986, Bracken, J. , dissenting]).

Of course, our precedents comport with Justice Bracken's view. Thus, while the nature and degree of a penalty pursuant to CPLR 3126 is a matter committed to the discretion of Supreme Court and we give deference to the determinations of Supreme Court in that regard (*Palmenta*, 266 AD2d at 91), we may disturb disclosure penalties imposed by Supreme Court in the absence of an abuse of discretion (*Monica W. v Milevoi*, 252 AD2d 260, 264 [1999]). Regardless of whether Supreme Court did abuse its discretion, we should disturb the penalty the court imposed because it is not commensurate with the conduct the penalty was meant to punish (*see e.g. Weissman, supra; Colucci v Jennifer Convertibles*, 283 AD2d 224, 225 [2001]; *Christian*, 269 AD2d at 137; *see also Quinn v City Univ. of N.Y.*, 43 AD3d 679 [2007]).

Finally, there does not appear to have been any justification for the court's refusal to sign the transcript of the proceedings in which it imposed a sanction of $500 due to defendant's failure to appear at the deposition. Even if the counterclaims had otherwise been properly dismissed, defendant was entitled to appellate review of the order imposing this sanction.

M-120 - *Arts4All v Judith L. Hancock*

Motion to dismiss respondents' cross appeal, and for other relief denied.

THIS CONSTITUTES THE DECISION AND
ORDER OF THE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 26, 2008

/s/
CLERK

APPENDIX E

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed July 25, 2006]

PRESENT: ACOSTA ____________ PART 61
Justice

ARTS4ALL, LTD., ET AL)
)
- v -)
)
JUDITH L. HANC)
)

INDEX NO.	101123/03
MOTION DATE	
MOTION SEQ. NO.	20
MOTION CAL. NO.	

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	
Answering Affidavits – Exhibits	See attached
Replying Affidavits ____________	

Cross-Motion ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Sec Seq. 022 (original)
Decision

Dated 7/11/06

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☒ FINAL DISPOSITION
☐ NON-FINAL DISPOSITION

CASE DUP

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK PART 61

Index No. 101123/03

Seq. Nos. 20, 21 & 22

[Filed July 25, 2006]

Arts4All Ltd and Richard Humphry,

Plaintiffs,

-against-

Judith L. Hancock,

Defendant.

Judith L. Hancock,

Third-Party Plaintiff

-against-

Daniel Y. C. Ng, Robert McBain, Joel Meyerson, and Peter Osgood,

Additional Defendants On the Counterclaims.

DECISION/ORDER

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant's motion to, inter alia, dismiss the remaining cause of action and strike plaintiffs' answers to defendant's counterclaims for failure to comply with discovery orders (Seq. No. 20); plaintiffs' motion to dismiss the counterclaims because of the unauthorized practice of law and defendant's abusive discovery demands, CPLR 3120, 3133 & 3123 and defendant's cross-motion seeking the Court's signature on minutes (Seq. 21); and, defendant's motion for summary judgment dismissing the remaining cause of action (Seq. 22):

Papers	**Numbered**
Order to Show Cause (Seq. 20), Affidavits & Memorandum of Law	**1-4 (Exhibits Schedules A-J)**
Affirmation in Opposition (and corrected pages) & Memorandum of Law	**5-6 (Exhibits 1-16)**
Reply Affidavits & Memorandum of Law	**7-9**
Hancock's Supplemental Affidavit	**10**

Papers	Numbered
Order to Show Cause (Seq. 21), Affirmation & Affidavits	1 (Exhibits 1-11, A-D, A)
Notice of Cross-Motion, Affidavits & Memorandum of Law	2-4 (Exhibits A-R; Annex 1: Response Documents & Exhibits A-G; Annex 2; Annex 3: Exhibits A-BB; Annex 4: Exhibits A-R)
Affirmations in Opposition and in Reply to Memorandum of Law	5-7 (Exhibits 1-11)
Notice of Motion (Seq. 22); Affidavit & Memorandum of Law	1-3 (Exhibits 1-11; Exhibits Incorporated by Reference)
Affidavits in Opposition & Memorandum of Law	4-5 (Exhibits 1-10; 1-4; 1-4)
Defendant's Reply Memorandum of Law	6

This case started with plaintiffs asserting twelve causes of action against defendant, Arts4All's former counsel. The complaint was dismissed by a Justice of this Court on September 25, 2003. The Appellate Division, First Department modified the order dismissing the complaint by reinstating four causes of action. Arts4All v. Hancock, 5 A.D.3d 106 (1st Dept. 2004). The matter was then transferred to this Part in early 2004. On September 14, 2004, this Court dismissed plaintiffs' remaining causes of action except for the portion of the first cause of action for breach of the no-disparagement clause in the parties' severance agreement. That decision was affirmed by the Appellate Division, First Department. Arts4All v. Hancock, 25 A.D.3d 453 (1st Dept. 2006). Defendant's counterclaims consists, inter alia, of claims for breach of contract and breach of fiduciary duties.

Given how very little is left to this case, the amount of motion practice (seventeen motions after this Court dismissed three out of the remaining four causes of action) and the incredibly lengthy submissions by the parties cannot be explained other than as an attempt to harass each other for personal issues totally unrelated to the relatively simple legal issues in this case.[1] This Court, however, will not allow the parties

---

[1] By order dated January 19, 2006, the Appellate Division, First Department, affirmed all six orders appealed by the parties. Arts4All v. Hancock, 25 A.D.3d 453 (1st Dept. 2006). These included, in addition to the order dismissing three out of the four remaining causes of action, the following five orders:

> [1] entered December 22, 2004, to the extent that it directed plaintiffs to answer defendant's counterclaims, but not as part of a second amended complaint, which the

to continue to waste this Court's resources any longer; the parties need to find a different battleground.

Notwithstanding the Court's imposition of gradual discipline, including repeated verbal and written warnings, and ultimately sanctions, the parties are ignoring anything that gets in the way of their bare knuckles fight.[2] Although the Court can cite to

---

court had already precluded; [2] entered January 26, 2005, which denied plaintiffs' motion to compel defendant to accept service of an amendment to a new complaint; [3] entered February 8, 2005, which denied defendant's motion to renew so much of the September 30, 2004 order seeking summary dismissal of the first cause of action in the first amended complaint; [4] entered February 15, 2005, which imposed costs on plaintiffs and Osgood for failing to comply with an earlier order directing them to answer defendant's counterclaims; and [5] entered May 5, 2005, which denied defendant's renewal motion for default on the counterclaims, struck plaintiffs' affirmative defenses to the counterclaims, declined to strike Osgood's affirmative defenses, and declined to order plaintiffs and Osgood to post security, unanimously affirmed, without costs.

[2] For instance, on September 25, 2005, after issuing it decision on six different motions (Seq. Nos. 13 to 18), this Court admonished the parties for their refusal to move the case forward:

> I have to tell you folks that I have reached my limit. Never has that happened to me yet in eight years as a judge.
>
> What seems to me is that the parties in this case are less interested in litigating legal issues than they are in a tit-for-tat that has more to do with personal matters than they do with legal disputes.
>
> I am serious when I tell you that you are to stop. You have

---

> burdened this Court unnecessarily in a way that I haven't been burdened by any other case, ever, and that is exemplified by the fact that this Court has had to read over 2,000 pages of documents just in the last couple of weeks on a matter where there is only a remaining [cause of action].
>
> You are to stop, okay? I am ordering you to engage in the depositions in the jury room, which will take place with a guard, okay" Whoever does not engage in what I am ordering them to do will suffer the consequences of that failure to comply, okay? I am asking you to please stop. Okay?

September 29, 2005 transcript at pages 4 - 5 (emphasis added). Despite these warnings, approximately one month later, on November 1, 2005, the parties were before the Court again because discovery was still not moving forward:

> It seems, despite my best efforts, a few weeks ago, that you folks are still not closer to the target than you were then.
>
> * * *
>
> I am going to sanction the counterclaimant [$500] for failing to appear for the deposition as scheduled by my order in October to appear in Part 61 to the jury room for that deposition. Inasmuch as the Court had previously sanctioned plaintiff in the same amount by a judgment that you folks have still generated several hundred pages and are still not satisfied. The Court deems the prior judgment satisfied.
>
> So, basically the Court just deems this $500 sanction satisfied by the $500 that I have previously sanctioned the plaintiffs in the case. I am - the Court sua sponte enters an order dismissing plaintiff's claims unless plaintiff complies with the following discovery schedule and I will give you that schedule in a minute [that schedule provided for all discovery to be completed by the end of November].
>
> I'm also doing the same thing, with respect to counterclaimant's. I am hereby ordering all the counter claims dismissed unless Ms. Hancock subjects herself to that same

numerous instances of extraneous matters finding their way into this litigation, a few examples would suffice. In this Court's decision under Seq. 6, plaintiffs were sanctioned $500.00 for failing to comply with this Court's April 19, 2004 order. Rather than accept the Court's imposition of sanctions on plaintiff, Hancock took it as an opportunity to garnish Arts4All's bank account and impede its ability to conduct business. Plaintiffs cried "uncle" and, ironically, then had to move to compel defendant to accept the $500.

Under Seq. 10, defendant, without raising new facts or a change in the law, CPLR 2221(e)(2), moved for renewal of an earlier motion for a default judgment on her counterclaims. She also sought an order striking "scandalous and prejudicial" matter from Peter Osgoods' (an Arts4All shareholder and board member, and a defendant on the counterclaims) responsive pleadings even though the "scandalous and

---

> discovery schedule. You have had over now two and a half years to conduct discovery, both documentary and otherwise, and you have failed to do so.
>
> * * *
>
> Any failure by either side to abide by this discovery schedule results automatically in dismissal of that party's action.

November 1, 2005 transcripts at pages 2,8-9(emphasis added). Although the Court had ordered the parties to complete discovery by the end of November, the parties were back in court on April 6, 2006, on Hancock's motion to dismiss for plaintiffs' failure to comply with discovery. The parties were last in Court on May 11, 2006, for argument on their respective motions to dismiss. After attempting to settle the parties' discovery requests, the Court ultimately gave up. See May 11, 2006 transcripts.

prejudicial" matter was relevant to the issue that she raised in the first instance. That is, in her amended counterclaims Hancock alleged that she was wrongfully terminated and then forced to sign a release. See ¶¶ 47-49 in Verified Amended Counterclaims. In his answer, Osgood alleged, inter alia, that Hancock was terminated for sexually harassing Humphrey. Significantly, at some point prior to this litigation, Hancock, then counsel to Arts4All, and Humphrey, Arts4All's CEO, were involved in a romantic relationship.

On May 19, 2005, plaintiff was ordered to turn over certain financial records and shareholder meeting minutes within 30 days of the order, which it failed to comply with thus prompting defendant to move to hold plaintiffs in contempt. Although this Court denied that motion (Seq. 16) on September 29, 2005, it ordered Arts4All to comply within 20 days of the order. On that same day, under Seq. 14, the Court ordered the parties to conduct all depositions in its jury room within 30 days of the order and further ordered that the Note of Issue be filed by November 18, 2005. Once again, that order was ignored.

Defendant also moved to dismiss the plaintiffs' remaining cause of action based on her claim that Arts4All had failed to pay franchise taxes. This Court denied that motion because not only did she waive it by failing to raise it in her answer or in a pre-answer motion to dismiss, FBB Asset Managers, Inc. v. Freund, 2 A.D.3d 573 (2nd Dept. 2003), but her claims that she first learned of the issue during oral argument on a different motion was belied by the fact she was Arts4All's counsel prior to the litigation.

In the meantime, defendant had submitted several requests for admissions. The first, marked "First Request for Admissions by Plaintiff," totaled 34 pages, with 222 paragraphs. The second, marked "First Request for Admissions by Counterclaim Defendant Peter Osgood" totaled 31 pages and 202 paragraphs. And the third, marked "Second Request for Admissions By Plaintiff and Counterclaim Defendant Peter Osgood" was 10 pages with 41 paragraphs. On September 29, 2005, this Court granted Arts4All and Osgood's motion to strike the requests for admissions inasmuch as they sought admission of the ultimate facts in the case. Washington v. Alco Auto Sales, 199 A.D.2d 165 (1st Dept. 1993).

At about the same time, defendant moved pursuant to CPLR 3103 and the Court's equitable powers for an order enjoining plaintiff Richard Humphrey from, inter alia, coming within 50 feet of defendant, stalking defendant or causing a third party to do so. That motion was denied on September 29, 2005, with leave to pursue the matter in Criminal Court.

The Note of Issue was eventually filed on January 13, 2006, but like everything else about this case, the simple filing of a Note of Issue turned into a major ordeal. The Clerk accepted the filing of the Note of Issue, but crossed out part of the caption because of the way the parties were demarcated. Of course, this prompted Arts4All to seek permission to move to dismiss the counterclaims even though there had been no prior complaints about the caption. See the Court's Decision and Order dated March 15, 2006 (Seq. 19). The Court also denied defendant's motion for an order striking Arts4All's and Osgood's jury demand and the latter's motion which sought a non-jury trial, but granted the parties leave to move in limine for the relief requested.

Equally as offensive to this Court as the filing of all of these unnecessary motions, was the parties' conduct during oral arguments. Indeed, examining each motion independently, it may be difficult to discern that ulterior motives were at play here. It is only upon listening to and observing the parties during oral argument and their utter lack of respect for each other that this Court came to its conclusion that the parties have no interest in resolving this dispute nor allow the Court or a jury to do so, but instead are intent on using the court as a weapon to harass each other.

The parties' desire to harass each other can also be gleaned by the reams of letters produced within the last few years. A good example of this harassment by letter can be seen in the March 20-21, 2006 exchange. Defendant had moved by order to show cause for certain relief and counsel for Arts4All, through his father, had sought a 7 day adjournment because he was recovering from emergency surgery. Court intervention was requested because defendant would agree to the adjournment only if Arts4All would submit opposition papers by 5:00 p.m. on a Friday rather than on Monday.

Now, two and a half years after this Court inherited this case and tried to compel the parties to engage in discovery, the parties are once again moving to dismiss each other's cases for failure to comply with discovery orders notwithstanding that both sides have violated discovery orders. Indeed, Arts4All failed to comply with, inter alia, this Court's September 29, 2005 order, which required that all discovery be completed by October 29, 2005, and the November 1, 2005 orders, which directed Arts4All to comply with certain aspects of the September 29th order.

Defendant has likewise failed to comply with this Court's orders. For instance, notwithstanding the Court's September 29th order, defendant waited to October 24, just five days before the end of discovery, to serve deposition notices.[3] She also waited until mid October to serve voluminous notice of discovery and inspection, interrogatories and notices to admit. Moreover, she did not submit to a properly noticed deposition until a much later date.

Notwithstanding numerous decisions in both of their favor clearly outlining the parties positions and the Court's interest in having this matter move forward, they simply will not take "yes" for an answer and proceed to trial. Accordingly, it is hereby

ORDERED that Plaintiffs' sole remaining count (that portion of the first cause of action for breach of the no-disparagement clause in the severance agreement) is dismissed pursuant to CPLR 3126(3); and it is further

ORDERED that defendant's counterclaims are dismissed pursuant to CPLR 3126(3); and it is further

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[3] Although defendant sought a revised discovery schedule on October 17, 2005, it could not have come as a surprise when on October 20, 2005, the Court denied the request.

ORDERED that defendant's motion for summary judgment dismissing plaintiffs' sole remaining cause of action is dismissed as moot.

This constitutes the Decision and Order of the Court.

Dated: July 11, 2006 ENTER

/s/ Rolando T. Acosta
Rolando T. Acosta, J.S.C.

[Stamp: SO ORDERED
ROLANDO T. ACOSTA J.S.C.]

Zachary R. Greenhill, Esq.
Greenhill Partners, P.C.
555 Fifth Avenue
New York, NY 10017
Attorneys for Plaintiffs Arts4All and Richard Humphrey & Additional Defendants on the Counter Claims

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg LLP
545 Fifth Avenue
New York, NY 10017
Attorneys for Defendant Hancock

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number: 101123/2003

[Filed March 20, 2006]

HON. ROLANDO T. ACOSTA PART 61

____
ARTS4ALL)
)
vs)
)
HANCOCK, L. JUDITH)
______________________)

Sequence Number: 019
STRIKE JURY DEMAND

INDEX NO. ______________
MOTION DATE ______________
MOTION SEQ. NO. ______________
MOTION CAL. NO. ______________

The following papers, numbered 1 to _____ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-3 (A-P)
Answering Affidavits – Exhibits	4-5 (1-2)
______________	
Replying Affidavits ______________	6-7 9-10, 11-12 7-8 (A-D)

Cross-Motion ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Hancock's motion for an order striking Plaintiff's and Osgood's jury demand and plaintiff's cross-motion for an order striking that portion of Hancock's Note of Issue which seeks trial without a jury are both DENIED.

If the parties do not settle the case in mediation, they may move in limine for the relief requested in this motion.

The parties should know that the clerks did not accept the Note of Issue as filed because there were problems with how the parties were denominated. The case, however, is going forward. Any problems with the caption will be fixed either in mediation or before this Court at a later date.

This constitutes the Decision and Order of the Court.

Dated 3/15/06

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST
☐ REFERENCE

APPENDIX G

Fax:2127325451 Jan 6 2006 16:47 P.02

Supreme Court
of the
State of New York

[SEAL]

71 THOMAS STREET
NEW YORK, N.Y. 10013-3821

ROLANDO T. ACOSTA
JUSTICE

January 6, 2006

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg LLP
545 Fifth Avenue
New York, NY 10017

Zachary R. Greenhill, Esq.
555 Fifth Avenue
New York, NY 10017

Kenneth W. Taber, Esq.
Pillsbury Winthrop Shaw Pittman, LLP
1540 Broadway
New York, NY 10036

Re: *Arts4All, Ltd. Et al. v. Hancock*
Index No. 1001123/03

Dear Gentlemen:

We changed the Note of Issue date for next Friday, January 13, 2006. I expect all depositions to be finished by then. If Ms. Hancock is medically unable to submit to a deposition, she needs to provide the Court with a note from a doctor.

Yours Truly

/s/
Rolando T. Acosta, J.S.C.

APPENDIX H

Supreme Court
of the
State of New York

[SEAL]

71 THOMAS STREET
NEW YORK, N.Y. 10013-3821

ROLANDO T. ACOSTA
JUSTICE

November 16, 2005

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg LLP
545 Fifth Avenue
New York, NY 10017

Zachary R. Greenhill, Esq.
555 Fifth Avenue
New York, NY 10017

Kenneth W. Taber, Esq.
Pillsbury Winthrop Shaw Pittman, LLP
1540 Broadway
New York, NY 10036

Re: *Arts4All, Ltd. Et al. v. Hancock*
Index No. 1001123/03

Dear Gentlemen:

Donald Keogh's and Nancy Peretsman's depositions must be held on or before December 14, 2005.

Mr. Greenhill's request for an adjournment of Mr. Ng's deposition to November 30, 2005 is granted. Note of Issue is extended to December 16, 2005

Yours Truly

/s/
Rolando T. Acosta, J.S.C.

APPENDIX I

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed October 7, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
-v-)
)
HANCOCK, L. JUDITH)
)

INDEX NO. 101123/03

MOTION DATE ______

MOTION SEQ. NO. 18

MOTION CAL. NO. ______

The following papers, numbered 1 to _____ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-3 (A-F)
Answering Affidavits – Exhibits	3-5 (1-14)
Replying Affidavits ____________	6-7 (A)

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Defendant's motion pursuant to CPLR § 3103 and the Court's equitable powers to enjoin plaintiff Humphrey from, inter alia, coming within 50 feet of defendant of defendant, stalking defendant or causing a third party to do so is DENIED with leave to pursue this matter in Criminal Court.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

APPENDIX J

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed October 7, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
-v-)
)
HANCOCK, L. JUDITH)
)

INDEX NO. 101123/03
MOTION DATE ______
MOTION SEQ. NO. 17
MOTION CAL. NO. ______

The following papers, numbered 1 to _____ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-3 (A-F)
Answering Affidavits – Exhibits	3-5 (1-14)
Replying Affidavits	6-7 (A)

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Palintiff's and additional defendant on the counterclaim (Osgood)'s motion for, *inter alia*, a protective order and striking defendant's first and second request for admissions is GRANTED to the extent of striking the defendant's first and second request for admissions inasmuch as they seek admission of the ultimate facts in the case. *Washington v. Alco Auto Sales*, 199 A.D.2d 165 (1st Dept. 1993).

This constitutes the Decision and Order of the Court.

Dated: September 29, 2005

SO ORDERED

/s/

ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

APPENDIX K

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number: 101123/2003

[Filed October 7, 2005]

PRESENT: HON. ROLANDO T. ACOSTA *Justice* PART 61

ARTS4ALL LTD)
)
-v-)
)
HANCOCK, L. JUDITH)
)

INDEX NO.	101123/03
MOTION DATE	
MOTION SEQ. NO.	16
MOTION CAL. NO.	

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-3 (1-12)
Answering Affidavits – Exhibits ____________________	
Replying Affidavits ____________	

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Defendant moves for an order pursuant to Judiciary Law §§ 753, 754 & 755 holding plaintiffs in contempt for not complying with this Court's May 19, 2005 order, which ordered plaintiffs, *inter alia*, to turn over "copies of the same interim financial information (such as quarterly profit and loss statements) which Arts4All provides to any other shareholder, at the same time and in the same manner as provided to such other shareholders," in that Arts4All has failed to turn over the April-June 2005 interim profit loss information. Defendant's motion is DENIED except that plaintiff Arts4All is hereby ORDERED to turnover the requested material within 20 days of this order if such information exists.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

APPENDIX L

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number: 101123/2003

[Filed October 7, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
-v-)
)
HANCOCK, L. JUDITH)
)

INDEX NO.	101123/03
MOTION DATE	
MOTION SEQ. NO.	15
MOTION CAL. NO.	

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-2 (A-G)
Answering Affidavits – Exhibits	3-4 (A-N)
Replying Affidavits	5-6 (A)

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Plaintiff's and additional defendant on the counterclaim (Osgood)'s motion to, *inter alia*, compel Hancock to accept $500.00 paid to satisfy judgment executed against plaintiff on March 16, 2005 to garnish plaintiff's bank account is GRANTED to the extent that plaintiff will re-submit a check for $500.00 to defendant within five days of this order if the check it had submitted was returned. No prejudgment interest since plaintiff posted undertaking.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

APPENDIX M

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed October 6, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
-v-)
)
HANCOCK, L. JUDITH)
)

INDEX NO.	101123/03
MOTION DATE	
MOTION SEQ. NO.	14
MOTION CAL. NO.	

The following papers, numbered 1 to _____ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-2 (A-P)
Answering Affidavits – Exhibits	3
______________________________	
Replying Affidavits ___________	4-5 (A-C)

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Plaintiff's and additional defendant on the counterclaim (Osgood)'s motion to compel discovery as per the March 3, 2005 Order of the Court and vacating all stays on discovery is GRANTED to the extent that all stays are vacated; all depositions to be conducted within 30 days of this Order in the jury room in Part 61, 71 Thomas Street, New York, NY 10013; depositions to be scheduled with Part 61 Clerk [(646) 386-3854]; Note of Issue to be filed by November 18, 2005.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

APPENDIX N

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number: 101123/2003

[Filed October 6, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
-v-)
)
HANCOCK, L. JUDITH)
)

INDEX NO.	101123/03
MOTION DATE	
MOTION SEQ. NO.	13
MOTION CAL. NO.	

The following papers, numbered 1 to _____ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-3 (1-22)
Answering Affidavits – Exhibits ______	
Replying Affidavits ______	

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Hancock's motion for an order granting summary judgment on the issue of liability is DENIED inasmuch as there exist triable issues of fact with respect to her counterclaims.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

APPENDIX O

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed August 9, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
-v-)
)
HANCOCK, L. JUDITH)
)

SEQ # 012
DISMISS ACTION

INDEX NO. ______________

MOTION DATE ______________

MOTION SEQ. NO. ______________

MOTION CAL. NO. ______________

this motion to/for ____________________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits . . .	
Answering Affidavits – Exhibits ______	/ see attached decision
Replying Affidavits ______	

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached Decision and Order dated August 4, 2005.

Dated: 8/4/05

SO ORDERED

/s/______________________
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST
☐ REFERENCE

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Index No. 101123/03

Seq. No. 12

[Filed August 9, 2005]

ARTS4ALL LTD AND RICAHRD
HUMPHRY,

PLAINTIFF,

-against-

JUDITH L. HANCOCK,

DEFENDANT.

JUDITH L. HANCOCK,

THIRD-PARTY PLAINTIFF

-against-

DANIEL Y. C. NG, ROBERT McBAIN,
JOEL MEYERSON, AND PETER OSGOOD,

ADDITIONAL DEFENDANTS
ON THE COUNTERCLAIMS.

DECISION/ORDER

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant third-party plaintiff (Hancock)'s motion to dismiss plaintiff's first amended complaint pursuant to CPLR 3211(a)(3):

Papers	Numbered
Notion of Motion, Affidavit and Memorandum of Law	**1-3 (Exhibits 1-30)**
Affidavit & Affirmation in Opposition & Memorandum of Law	**4-6 (Exhibits A-F; A-B)[1]**
Reply Affirmation and Memorandum of Law	**7-8 (Exhibits 1-10)**

Hancock's motion to dismiss pursuant to CPLR 3211(a)(3) based on her claim that Arts4All has failed to pay franchise taxes, BCL 1312(a), is DENIED. Initially, it should be noted that Hancock waived this defense by failing to raise it in her answer or in a motion to dismiss made prior to answering. FBB Asset Managers, Inc. v. Freund, 2 Ad3d 573 (2nd Dept. 2003).

---

[1] In addition the Court considered various documents submitted by plaintiff at the oral argument held on June 23, 2005, as well as a letter by plaintiff dated June 23, 2005 with an enclosed document.

Hancock's claim that she first learned of this defense during oral argument on a different motion is belied by the fact that she was in fact Arts4All's general counsel prior to this litigation.

Even if the defense had been properly raised, Hancock has not established that Arts4All failed to pay franchise taxes. And even if Arts4All had failed to do so, its failure would not have been jurisdictional and this Court would have simply issued a stay affording Arts4All the opportunity to cure this non-jurisdictional defect. Tri-Terminal Corp. v. CITC Industries, Inc., 78 A.D.2d 609 (1st Dept. 1980).

Arts4All is granted leave to move to strike Hancock's request for admissions (including the "second request for admissions"). Arts4All will file and serve its motion by August 12, 2005. Hancock's opposition is due on August 26, 2005. Arts4All's reply is due on September 8, 2005. Oral argument on the motion is scheduled for September 29, 2005, at 9:30 a.m. Given this time frame, the parties shall provide the Court with a courtesy copy of all papers.

This constitutes the Decision and Order of the Court.

Dated: August 4, 2005

SO ORDERED

/s/

ROLANDO T. ACOSTA J.S.C.

APPENDIX P

EX PARTE MOTION OFFICE

APPROVED SP MS
FOR THE PAYMENT #14
OF MOTION FEE
ONLY

At ~~an~~ IAS Part 61 of the Supreme Court of the State of New York, held in and for the County of New York, located at 71 Thomas Street ~~Courthouse~~, ~~New York,~~ New York, New York, on the 5th day of August 2005.

020273

PRESENT:
HON. ROLANDO T. ACOSTA
Justice.

ARTS4ALL LTD AND RICHARD HUMPHREY,	)
Plaintiffs,	)
-against-	)
JUDITH L. HANCOCK,	)
Defendant and Counterclaimant.	)

JUDITH L. HANCOCK,)
)
Counterclaimant,)
)
-against-)
)
DANIEL Y C NG, ROBERT McBAIN,)
JOEL MEYERSON, AND PETER OSGOOD,)
)
Additional Defendants)
on the Counterclaims.)
)

Upon reading and filing the affirmation of Zachary R. Greenhill, Esq., dated the 4th day of August, 2005, with the exhibits attached thereto, an attorney for plaintiffs and the additional defendant on the counterclaims PETER OSGOOD [OSGOOD] and affirming that no prior application has been made for the relief requested by this motion, the complaint, the answer with amended verified counterclaims, the reply, and the verified answer with affirmative defenses to the amended verified counterclaims, and all prior proceedings had herein,

LET THE DEFENDANT AND COUNTERCLAIMANT/Plaintiff JUDITH L. HANCOCK, ESQ., *pro se*, APPEAR AND SHOW CAUSE before this court, at Part 61 thereof, at the courthouse located at 71 Thomas Street, New York, New York, on the 22nd day of ~~August~~ Sept, 2005 or as soon thereafter as counsel can be heard why and order shall not issue that:

a. discovery should immediately proceed per the requirement of HONORABLE ROLANDO T. ACOSTA stated March 10, 2005;

b. there be no further automatic stays of plaintiffs and OSGOOD's discovery without court order;

c. discovery should immediately commence on the following schedule:

i. By August 26, 2005, answers served by counterclaimant to the second set of interrogatories, served January 5, 2005 by plaintiffs and OSGOOD, to which there has never been an answer or objection;

ii. By September 26, 2005 the deposition of counterclaimant, never held, after service of four (4) notices for that deposition the first of which served on March 4, 2003, and the fourth notice having been served on January 3, 2005;

iii. By August 26, production of documents by counterclaimant, the notice for discovery and inspection and copying having been served on January 3, 2005;

iv. plaintiffs and OSGOOD shall have priority of deposition having served two (2) sets of interrogatories on March 19, 2003 and January 5, 2005, four (4) depositions notices on March 4, 2003, September 26, 2003, October 10, 2003 and January 3, 2005 and one (1) notice for discovery and inspection and copying on January 3, 2005 and counterclaimant having never served any since the counterclaims commenced on February 27, 2003, more than two (2) years and four (4) months ago;

v. service of answers to interrogatories and production of documents by counterclaimant shall be made at the office of plaintiffs' and OSGOOD's attorney by 6:00 p.m. and the deposition of counterclaimant at plaintiffs' ARTS4ALL or at the office of plaintiffs' and OSGOOD's attorney as they shall determine.

SUFFICIENT CAUSE BEING ALLEGED THEREFORE, it is ordered that the date by which a response to counterclaimants' fourth CPLR 3212 motion, and the submission date of that CPLR 3212 motion served while counterclaimant's second CPLR 3211 (a) motion is still pending be adjourned pending the hearing on this motion;

R.J.A

J.S.C.

AND IT FURTHER ORDERED THAT service of answering papers shall be made by personal service at the office of the attorney for the plaintiffs and OSGOOD not later than 6:00 p.m. on the 9th day of ~~August~~ Sept. 2005 and that reply papers, if any, shall be served on JUDITH L. HANCOCK, ESQ., *pro se* or on TRACHTENBERG RODES & FRIEDBERG, LLP, attorneys for counterclaimant by 5:00 o'clock on the 19th day of ~~August~~ Sept., 2005;

AND IT IS FURTHER ORDERED THAT service upon defendant and counterclaimant, JUDITH L.

HANCOCK, ESQ., *pro se*, at 80 Bay Street Landing, Apt. 8K , Staten Island, New York 10301 of a copy of this order and on Trachtenberg Rodes & Friedberg, 545 Fifth Avenue, New York, New York together with the papers upon which it is granted, by overnight delivery service on or before the 10th day of August, 2005, shall be deemed good and sufficient service.

Oral Argument
directed:
R.T.A.
J.S.C.

ENTER

/s/ /R.T.A.
J.S.C.

APPENDIX Q

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed June 8, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL)
)
-v-)
)
JUDITH L. HANCOCK,)
)

INDEX NO. 101123/03
MOTION DATE ____________
MOTION SEQ. NO. 011
MOTION CAL. NO. ____________

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-3 (1-25)
Answering Affidavits – Exhibits	4-5 (A-C)
Replying Affidavits ____________	6

None of the post-argument letters have been considered.

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision dated May 19, 2005

Dated: May 24, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST
☐ REFERENCE

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Index No. 101123/03

Seq. No. 11

[Filed June 8, 2005]

ARTS4ALL LTD AND RICHARD
HUMPHRY,

PLAINTIFFS,

-against-

JUDITH L. HANCOCK,

DEFENDANT.

JUDITH L. HANCOCK,

THIRD-PARTY PLAINTIFF

-against-

DANIEL Y. C. NG, ROBERT McBAIN,
JOEL MEYERSON, AND PETER OSGOOD,

ADDITIONAL DEFENDANTS
ON THE COUNTERCLAIMS.

DECISION/ORDER

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant and counterclaimant Judith L. Hancock's motion seeking an order directing plaintiff Arts4All to provide her with (1) a certified copy of its stockholder ledger; (2) copies of its final, non-"draft" year-end profit and loss statements and balance sheets for fiscal years 2001, 2002, 2003 and 2004 and with a copy of its quarterly profit and loss statement for the first quarter of fiscal year 2005 at least ten days prior to the 2005 shareholders meeting; (3) copies of its year-end profit and loss statements and balance sheets for all future fiscal years, so long as Hancock is an Arts4All shareholder, such documents to be provided within sixty days after the end of the relevant fiscal year and in any event at least ten days prior to the annual shareholders meeting relating to such fiscal year; (4) copies of the same interim financial information (such as quarterly profit and loss statements) which Arts4All provides to any other shareholder, at the same times and in the same manner as provided to such other shareholder, so long as Hancock is an Arts4All shareholder at least ten days prior to the 2005 shareholders meeting; and (5) certified copies of the minutes of all Arts4All shareholder meetings held since the 2002 annual shareholders meeting and certified copies of Arts4All's incorporation papers (articles of incorporation and any preferred stock certificates of designation) and by-laws, including all amendments thereto, all such documents to be provided at least ten days prior to the 2005 shareholders meeting:

Papers	**Numbered**
Order to Show Cause, Affirmation & Memorandum of Law	**1-3 (1-25)**
Affirmation in Opposition & Memorandum of Law	**4-5 (A-C)**
Reply Memorandum of Law	**6**

Hancock's motion is GRANTED.

Under both Delaware and New York law, Hancock is entitled to the requested documents provided that she has asked for them in writing, has stated a proper purpose and has requested them in good faith. See Delaware General Corporation Law § 220; New York Business Corporations Law § 1315(a)(b); Tatko v. Tatko Brothers Slate Co., 173 A.D.2d 917, 918 (3rd Dept. 1991) (proper purpose includes "efforts to ascertain the financial condition of the corporation . . . to calculate the value of the stock, to investigate management's conduct, and to obtain in aid of legitimate litigation").

Here, Hancock requested: (1) a copy of Arts4All's stockholder ledger; (2) copies of its year-end profit and loss statements and balance sheets for fiscal years 2001, 2002, 2003 and 2004 and with a copy of its quarterly profit and loss statement for the first quarter of fiscal year 2005; and (3) the minutes of all Arts4All shareholder meetings held since the 2002 annual shareholders meeting by Memorandum dated March

21, 2005. Moreover, she has demonstrated proper purpose and good faith in requesting these documents. Specifically, she sought them "for the proper purpose of ascertaining the financial condition of Arts4All, evaluating the value of her stock, investigating management's conduct, communicating with her fellow shareholders in advance of the 2005 annual meeting and effectively participating in such meeting." Hancock's Reply at 5; Hancock Moving Affidavit at paragraphs 11, 13 and 19.

Plaintiff's argument that the March 21, 2005 Memorandum was insufficient is of no moment inasmuch as the present motion satisfies all the statutory requirements. It simply makes no sense to force Hancock to resubmit her request, to then have plaintiff deny it simply to have this Court order plaintiff to turn the documents over.

Accordingly, is hereby

ORDERED that plaintiff Arts4All turn over (1) a copy of Arts4All's stockholder ledger; (2) copies of its non-"draft" year-end profit and loss statements and balance sheets for fiscal years 2001, 2002, 2003 and 2004 and with a copy of its quarterly profit and loss statement for the first quarter of fiscal year 2005; and (3) the minutes of all Arts4All shareholder meetings held since the 2002 annual shareholders meeting to Hancock within 30 days of service of this Order with notice of entry; and it is further

ORDERED that Arts4All turn over (1) copies of its year-end profit and loss statements and balance sheets for all future fiscal years, so long as Hancock is an Arts4All shareholder, such documents to be provided within sixty days after the end of the relevant fiscal year and in any event at least ten days prior to the annual shareholders meeting relating to such fiscal year; and (2) copies of the same interim financial information (such as quarterly profit and loss statements) which Arts4All provides to any other shareholder, at the same times and in the same manner as provided to such other shareholder, so long as Hancock is an Arts4All shareholder.

This constitutes the decision and order of the Court.

Dated: May 19, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION
☐ DO NOT POST

APPENDIX R

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Index No. 101123/03

Seq. No. 10

[Filed May 5, 2005]

ARTS4ALL LTD AND RICHARD HUMPHRY,

PLAINTIFF,

-against-

JUDITH L. HANCOCK,

DEFENDANT.

JUDITH L. HANCOCK,

THIRD-PARTY PLAINTIFF

-against-

DANIEL Y. C. NG, ROBERT McBAIN, JOEL MEYERSON, AND PETER OSGOOD,

ADDITIONAL DEFENDANTS)
ON THE COUNTERCLAIMS.)
)

DECISION/ORDER

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant third-party plaintiff (Judith Hancock)'s motion seeking renewal on her CPLR § 3215 motion or, alternatively, seeking an order directing plaintiffs and counterclaim defendant Peter Osgood to post security and striking material from their answer, and other relief:

Papers	**Numbered**
Notice of Motion, Affidavits & Memorandum of Law	**1-4 (Exhibits 1, 1-25)**
Affirmation in Opposition & Memorandum of Law	**5-6 (Exhibits A-D)**
Reply Affidavit & Memorandum of Law	**7-8 (Exhibits 1-6)**

That portion of the motion seeking renewal of defendant third-party plaintiff (Hancock)'s motion for a default judgment is denied inasmuch as the requirements set for in CPLR § 2221(e)(2) have not been satisfied. That is, the motion for leave to renew is not "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination."

In its December 17, 2004, the Court inadvertently referred to plaintiffs' reply to Hancock's answer as an "answer." As CPLR § 3011 makes clear, the proper term is a "reply." It is also clear that in a reply, plaintiffs cannot raise affirmative defenses. Accordingly, the "answer" filed by plaintiffs ARTS4ALL Ltd and Richard Humphry is deemed a "reply," and the affirmative defenses are stricken with respect to ARTS4ALL Ltd and Richard Humphry. Since defendant Osgood was not an original party to the action, his service of responsive pleadings to Hancock's answer is proper. CPLR 3019. Accordingly, the affirmative defenses are not stricken as to Osgood.

The Court also declines to order plaintiffs and counterclaim defendant Osgood to post security at this juncture. The issue of posting security will be reviewed by this Court again in deciding the pending motion (Seq. 11), brought on by order to show cause and argued on April 21, 2005.

Hancock's request for an order striking "scandalous and prejudicial matter" from plaintiffs' and counterclaim defendant's answer is moot with respect to ARTS4All and Hancock inasmuch as the affirmative defenses were stricken from their reply. Her request, however, is denied with respect to Osgood inasmuch as the so called scandalous matter deals with issues that she brought up in the first instant.

A preliminary conference is scheduled for June 2, 2005.

This constitutes the Decision and Order of the Court.

Dated: April 25, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one:
☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION
☐ DO NOT POST

APPENDIX S

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed February 8, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL)
)
-v-)
)
HANCOCK, L. JUDITH)
)

9
RENEWAL

INDEX NO. __________

MOTION DATE __________

MOTION SEQ. NO. __________

MOTION CAL. NO. __________

a motion to/for ________________

PAPERS
NUMBERED

Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .

Answering Affidavits – Exhibits

____

Replying Affidavits __________

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion for renewal on that portion of defendant-counterclaimant's Summary Judgment Motion, decided by this court on September 14, 2004, seeking summary judgment in the 1st cause of action in the 1st amended complaint is Denied.

Dated: 1/31/05

SO ORDERED

/s/ ____________________
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST

APPENDIX T

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed February 8, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
vs)
)
HANCOCK, L. JUDITH)
)

SEQ 8
REARGUMENT/RECONSIDERATION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – ~~Affidavits~~ Memo of Law – Exhibits . . .	1-2 (A-K)
Answering ~~Affidavits – Exhibits~~ Memo of law	3
Replying ~~Affidavits~~ Memo of law	4

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied.

Dated: 1/31/05

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST

APPENDIX U

SUPREME COURT OF
THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number: 101123/2003

[Filed January 26, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
Justice

ARTS4ALL LTD)
)
vs)
)
HANCOCK, L. JUDITH)
)

SEQ 7
COMPEL

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits & Memo of Law – Exhibits . . .	1-3 (A-G + pleadings)
Answering Affidavits & Memo of Law – Exhibits ________________	4-5 (A-B)
Replying Affidavits & Memo of law	6-7

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied for the reasons stated in the decisions under seq. 4, 5 and 6.

This constitutes the decision and order of the court.

Dated: 12/16/04

SO ORDERED

/s/________________________
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST *MDAF*

APPENDIX V

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number: 101123/2003

[Filed December 22, 2004]

PRESENT: ______________________________ PART 61
Justice

ARTS4ALL LTD)
)
vs)
)
HANCOCK, L. JUDITH)
)

SEQ 6
DEFAULT JUDGMENT

INDEX NO. ______________

MOTION DATE ______________

MOTION SEQ. NO. 6

MOTION CAL. NO. ______________

The following papers, numbered 1 to _____ were read on this motion to/for _________

PAPERS
NUMBERED

Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .

Answering Affidavits – Exhibits

Replying Affidavits ____________

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Defendant's motion for a default judgment is denied as per attached decision.

Dated: 12/17/04

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Index No. 101123/03

Seq. No. 6

[Filed December 22, 2004]

ARTS4ALL LTD AND RICHARD
HUMPHRY,

PLAINTIFFS,

-against-

JUDITH L. HANCOCK,

DEFENDANT.

JUDITH L. HANCOCK,

THIRD-PARTY PLAINTIFF

-against-

DANIEL Y. C. NG, ROBERT McBAIN,
JOEL MEYERSON, AND PETER OSGOOD,

ADDITIONAL DEFENDANTS
ON THE COUNTERCLAIMS.

DECISION/JUDGMENT

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered by the Court in reviewing defendant's motion for a default judgment on her counterclaims:

Papers	**Numbered**
Notice of Motion, Affirmation & Memorandum of Law	**1-3 (1-16)**
Affidavit in Opposition and Memorandum of Law	**4-5 (A-B)**
Reply Memorandum of Law	**6**

Defendant's motion for a default judgment on her counterclaims is denied, except that plaintiff is ORDERED to answer defendant's counterclaims by December 31, 2004. The Court will not tolerate any attempts by plaintiff to include its answer as part of a second amended complaint, which this Court has precluded plaintiff from filing. Plaintiff's failure to answer by December 31, 2004, will result in a default judgment in defendant's favor.

Plaintiff is ORDERED to pay the cost for defendant's motion in the amount of $500.00 for failing to comply with this Court's April 19, 2004 order, which ordered plaintiff to answer defendant's counterclaims by June 11, 2004.

A preliminary conference is scheduled for January 13, 2005.

This constitutes the decision and order of the Court.

December 17, 2004

/s/
ROLANDO T. ACOSTA J.S.C.

Zachary R. Greenhill, Esq.
GREENHILL PARTNERS, P.C.
555 Fifth Avenue
New York, New York 1001 7
Attorneys for Plaintiffs and
Additional Defendants on
Counterclaims

David G. Trachtenberg, Esq.
TRACHTENBERG, RODES & FRIEDBERG, LLP
545 Fifth Avenue
New York, New York 10017
Attorneys for Defendant

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

DATE CORRECTED

Index No. 101123/03

Seq. No. 6

[Filed February 15, 2005]

ARTS4ALL LTD AND RICHARD HUMPHRY,

PLAINTIFFS,

-against-

JUDITH L. HANCOCK,

DEFENDANT.

JUDITH L. HANCOCK,

THIRD-PARTY PLAINTIFF

-against-

DANIEL Y. C. NG, ROBERT McBAIN, JOEL MEYERSON, AND PETER OSGOOD,

ADDITIONAL DEFENDANTS ON THE COUNTERCLAIMS.

AMENDED DECISION/JUDGMENT

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The Court's Decision and Order dated December 17,2004 (Seq. 6) is amended to reflect that:

Plaintiffs ARTS4ALL, LTD and Richard Humphry and counterclaim defendant Peter Osgood, all represented by Greenhill Partners, PC, are ORDERED to pay the cost for defendant's motion in the amount of $500.00 for failing to comply with this Court's April 19, 2004 order, which ordered plaintiffs and additional counterclaim defendants to answer defendant's counterclaims by June 11, 2004. Rules of the Chief Administrator § 130-1; see also Jalor Color Graphics, Inc v. Universal Advertising Systems, Inc, 2 A.D.3d 165 (1st Dept 2004) (Order of the Appellate Term of the Supreme Court, First Department, entered on or about September 30, 2002, which, to the extent appealed from as limited by the briefs, affirmed the orders of Civil Court, New York County (Rolando Acosta, J.), entered on or about December 27, 1999 and January 2 1, 2000, which granted plaintiff's motion for sanctions and sua sponte awarded costs, and directed nonparty appellant attorney for defendant to pay $7,500 to the Lawyers' Fund for Client Protection and $2,100 to plaintiff's counsel, unanimously affirmed, with costs)

This constitutes the decision and order of the Court.

Dated: January 28, 2005

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Zachary R. Greenhill, Esq.
GREENHILL PARTNERS, P.C.
555 Fifth Avenue
New York, New York 10017
Attorneys for Plaintiffs and
Additional Defendants on
Counterclaims

David G. Trachtenberg, Esq.
TRACHTENBERG, RODES & FRIEDBERG, LLP
545 Fifth Avenue
New York, New York 10017
Attorneys for Defendant

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION
☐ DO NOT POST

APPENDIX W

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Index No. 101123/03

Seq. No. 4 & 5

[Dated September 14, 2004]

ARTS4ALL LTD AND RICHARD HUMPHRY,)

PLAINTIFFS,)

-against-)

JUDITH L. HANCOCK,)

DEFENDANT.)

JUDITH L. HANCOCK,)

THIRD-PARTY PLAINTIFF)

-against-)

DANIEL Y. C. NG, ROBERT McBAIN, JOEL MEYERSON, AND PETER OSGOOD,)

ADDITIONAL DEFENDANTS)
ON THE COUNTERCLAIMS.)
)

DECISION/JUDGMENT

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant's motion for summary judgment dismissing the four remaining causes of action (Seq. 4) and plaintiff's motion for leave to file a second amended complaint (Seq. 5):

Papers	**Numbered**
Defendant's Notice of Motion for Summary Judgment, Affirmation and Memorandum of Law	**1-3 (Exhibit 1-30)**
Plaintiff's Affirmation in Opposition, Supplemental Affirmation and Memorandum of Law	**4-6 (Exhibits A-D)**
Defendant's Reply Memorandum of Law	**7**

Papers	Numbered
Plaintiff's Notice of Motion to Amend First Amended Complaint, Affidavit and Memorandum of Law	**8 (Exhibits)**
Defendant's Affidavits in Opposition and Memorandum of Law	**9 (Exhibits 1-23; 1-2)**
Plaintiff's Reply Affidavit and Memorandum of Law	**10 (Exhibits A-D)**

Background

On September 13, 2003, a Justice of this Court granted defendant's motion pursuant to CPLR § 3211(a)(7) dismissing plaintiff's first amended complaint. Plaintiff appealed and on March 2, 2004, the Appellate Division, First Department, modified the Court's order dismissing the complaint by denying the motion as to the following causes of action:

> 1. The portion of the first cause of action for breach of the no-disparagement clause in the subject severance agreement pertaining to defendant's statement to various persons in the State of Ohio, but allow only Arts4All to assert such claim;
>
> 2. The second cause of action for slander based on defendant's statements to one Korn;
>
> 3. The seventh cause of action for libel based on defendant's statements to Arts4All's Board; and,

4. The portion of the twelfth cause of action for prima facie tort pertaining to defendant's statement to Ohio officials, but allow only Arts4All to assert such claim.

The Court also denied plaintiff's request to replead, citing CPLR §3211(e). Arts4All, Ltd v. Hancock, 5 A.D.3d 106, 773 N.Y.S.2d 348 (1st Dept. 2004).

Defendant's Motion for Summary Judgment

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, supra, 49 N.Y.2d at 560, 562; see also CPLR §3212(f)("[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion. . . .").

The portion of the first cause of action for breach of the no-disparagement clause in the subject severance agreement pertaining to defendant's statement to various persons in the State of Ohio, but allow only Arts4All to assert such claim

On July 15, 2002, Hancock and Arts4All, by its CEO Richard Humphry, signed a severance agreement. Paragraph 10 of the severance agreement states "[n]either HANCOCK nor the COMPANY will at any time denigrate each other, orally or in writing." The first cause of action alleges that Hancock violated this no-disparagement clause by, inter alia, addressing an unsigned statement dated December 5, 2002, to the Chief of Staff of the Governor of Ohio and to various members of the Ohio Republican Party. The statement to the Ohio government officials made reference to several articles on Arts4All's website, two of which were critical of the Republican Party, and then questioned why a Republican Governor would support an anti-Republican company. As a result of the statement, plaintiff alleges that it suffered monetary damages of five million dollars, which the Appellate Division, First Department reduced to $975,000. Arts4All, Ltd v. Hancock, supra, 773 N.Y.S.2d at 353.

To recover lost future profits as contract damages, plaintiff must prove causation of damages with certainty, amount of damages with reasonable degree of certainty and that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made. Kenford Co. v. County of Erie, 67 N.Y.2d 25, 261 (1986)(the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of intervening causes); PIA Investments, Ltd. v. UBS Securities, Inc., 211 A.D.2d 599 (1st Dept.), aff'd 86 N.Y.2d 812 (1995).

Here, defendant argues that plaintiff failed to establish any of these elements. Inasmuch as discovery has not been completed with respect to this issue, however, this portion of the summary judgment motion is premature. CPLR 3212(f). This is particularly true given John Robert Kirkland's affidavit (Exhibit D in Humphrey's Affidavit), where Kirkland, a lobbyist retained to "promote an initiative known as "Ohio: State of the Arts," stated that he was told by an Elizabeth Ross, the person in charge of the initiative in the Ohio Governor's office, that the initiative had the full support of the Governor of Ohio. On the evening of December 5, 2002, Kirkland received a telephone call from Ross stating that the Governor's Chief of Staff had received a damaging anonymous written memorandum about the initiative. Kirkland further stated that Ross was instructed by the Chief of Staff to halt further support for the initiative and that the State of Ohio could not go forward with it. The initiative was to use the "propriety platform" of Arts4All.

Given the opportunity to conduct full discovery, it is plausible that plaintiff will be able to show a connection between defendant's statement to Ohio officials and Arts4All's failure to obtain the appropriations. Indeed, as the First Department noted:

> Defendant also contends that because there are so many variables and contingencies in obtaining a federal appropriation, plaintiff cannot show a causal connection between her statement to Ohio officials and Arts4All's failure to obtain the appropriation. Such argument would be more appropriately made after joinder of issue. Giving the complaint every favorable inference, it is plausible that after receiving defendant's anti-Arts4All statement, Ohio officials put pressure on the University of Toledo and the Ohio Supercomputing Center not to pursue their request for federal appropriations, which request would have benefited Arts4All, refused to lobby their Congressional representatives in favor of this grant, and/or actively lobby their Congressional representatives to oppose the grant.

Arts4All, Ltd v. Hancock, supra, 773 N.Y.S.2d at 353. At the very least, full discovery could raise triable issues of fact with respect to this cause of action.

The portion of the twelfth cause of action for prima facie tort pertaining to defendant's statement to Ohio officials, but allow only Arts4All to assert such claim

By its twelfth cause of action, plaintiff alleges prima facie tort[1] based on the same statement to the

---

[1] Prima facie tort consist of four elements: 1. intentional infliction of hard; 2. causing special damages; 3. without excuse or

Ohio government officials. This cause of action was reinstated by the First Department for the same reasons stated with respect to the portion of the first cause of action for breach of the no-disparagement clause, namely, that defendant should move for summary judgment after joinder of issue. Arts4All, Ltd v. Hancock, supra, 773 N.Y.S.2d at 353.

Unlike the first cause of action, however, where this Court held that summary judgment was premature inasmuch as discovery was incomplete, here defendant has establish a prima facie showing of entitlement to summary judgment. Specifically, defendant established that the Noerr-Pennington doctrine, which grants immunity from federal and state law tort claims arising out of a citizen's exercise of the First Amendment right to lobby the government, bars Arts4All's prima facie tort claim. See Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen, 313 F. Supp 2d 339 (S.D.N.Y. 2004)(Noerr-Pennington doctrine applies when citizen of one state petitions government of a different state); Concourse Nursing Home v. Engelstein, 278 A.D.2d 35 (1st Dept. 2000), affirming 181 Misc. 2d 85 (Sup. Ct., N.Y. Co. 1999); Weisman Real Estate, Inc. v. Big V Supermarkets, Inc., 268 A.D.2d 101 (2d Dept. 2000); D.A. Collins Construction Co., Inc. v. ICOS/NCCA A Joint venture, ICOS, 1994 WL 328626 (N.D.N.Y.); Rudoff v. Huntington Symphony Orchestra, Inc., 91 Misc. 2d 264 (App. Term. 2nd Dept. 1977).

---

justification; and 4. by an act or series of acts that would otherwise be lawful. Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332 (1983); Riverhead Centre, LLC v. Headriver, LLC, 2001 wl 1649269 (Sup Ct. Suffolk Co).

Having established her rights under Noerr-Pennington, the burden shifted to plaintiff to prove that defendant's conduct was a "sham;" that is, that defendant was not at all serious about the object of the petition, but did so merely to inconvenience plaintiff. Weisman Real Estate, Inc. v. Big v. Supermarkets, Inc., supra, 268 A.D.2d 109. Plaintiff, however, failed to do so, especially since defendant's "objectively reasonable and ultimately successful effort to influence government action cannot be considered a sham." Id. Accordingly, this portion of defendant's motion for summary judgment is granted.

The second cause of action for slander based on defendant's statements to Korn

In its second cause of action (slander per se), plaintiff alleges that defendant slandered Arts4All and Humphry when she told Korn, the president of Artsvision Ltd (who had undertaken joint efforts with Arts4All) that Arts4All was poorly run, that Korn and Artsvision should not do business with Arts4All, that Korn would be upset if he know how Arts4All was run, and that Humphry was incompetent. Defendant also spoke to Korn about starting a new company to compete with Arts4All.

Slander is not actionable unless the plaintiff suffers special damages of fall within one of the "slander per se" exceptions to the rule. Liberman v Gelstein, 80 NY2d 429, 434-35 (1992). One of the "slander per se" exceptions consists of statements that tend to injure another or his trade, business or profession. Id. at 435. When statements fall within a "slander per se" category, the law presumes that damages will result, and they need not be alleged to proven. Id. As the

Leiberman Court noted, however, "[c]ourts have long recognized that the public interest is served by shielding certain communications, though possible defamatory, from litigation, rather than risk stifling them altogether. . . When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only conditionally privileged" Id. at 437. One such conditional privilege is the "common interest privilege," which extends to a "communication made by one person to another upon a subject in which both have an interest." Id. (citing Stillman v. Ford, 22 N.Y.2d 48, 55 (1968)).

A plaintiff can defeat the privilege by showing that defendant spoke with malice. Id. at 437 Malice can be shown either at common law, by raising a triable issue of fact as long as a reasonable jury could conclude that ill will was the one and only cause for the publication, or by establishing constitutional malice, which is defined as publishing a statement knowing of its falsity or acting with reckless disregard for the truth or falsity of the statement. Under this standard, the "plaintiff must demonstrate that the 'statements [were] made with [a] high degree of awareness of their probably falsity.' . . . In other words, there 'must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication.'" Id; Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 376 (1986)(privilege is conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity).

Here, defendant is correct that the common interest privilege applies to the facts of this case (indeed, Justice Abdus-Salaam already held that it did). Moreover, the First Department held that defendant's statements to Korn were not motivated solely by malice in upholding the dismissal of the tortious interference claim (the ninth cause of action), thus plaintiff cannot now argue common law malice with respect to this claim based on the same conversation with Korn.

Although the First Department reinstated this claim because plaintiff did not have to show evidentiary facts to support their allegations of malice on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), Arts4All, Ltd v. Hancock, supra, 773 N.Y.S.2d at 352, on a motion for summary judgment, plaintiff has the burden in this case to show constitutional malice (common law malice already having been decided against plaintiff). Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56, 61 (1959)(when common interest privilege applies, plaintiff bears the dual burden of proving falsity and malice). Plaintiff, however, has failed in this respect. Nor has plaintiff indicated how discovery would assist him in establishing that defendant's statements were reckless given her investigation, which revealed certain improprieties of which even the Chairman of the Board indicated that he was aware. Accordingly, this portion of the motion for summary judgment is granted.

The seventh cause of action for libel based on defendant's statements to Arts4All's Board

In its seventh cause of action, plaintiff charged defendant with libel arising out of defendant's memo to the Board of Directors that Humphry promoted deceptive accounting practices, used Arts4All's time and resources for personal business without authorization, provided false information to government agencies and insurance companies, misrepresented personal information and ownership of property, and mismanaged Arts4all.

Here, defendant established her entitlement to summary judgment dismissing the seventh cause of action for several reasons. First, plaintiff failed to comply with CPLR 3016(a) inasmuch as the actual defamatory words were not plead. Dillon v. City of New York, 261 A.D.2d 34, 40 (1st Dept. 1999).

Second, even if all of the statements in question were false statements of fact, the common interest privilege would bar the libel claim inasmuch as plaintiff has failed to establish malice. Liberman v Gelstein, supra, 80 N.Y.2d at 439 (statements made to further the protected common interest do not lose their protection because the defendant also despised the plaintiff).[2] Accordingly, this portion of the motion for summary judgment is also granted.

---

[2] In reinstating this cause of action, the First Department held that although the common interest privilege applied, plainitffs had sufficiently pleaded malice to survive a motion to dismiss pursuant to CPLR 3211(a)(7). Arts4All, Ltd v. Hancock, supra, 773 N.Y.S.2d at 352

Plaintiff's Motion to Amend the First Amended Complaint

Plaintiff's motion for leave to amend the first amended complaint is denied. Contrary to plaintiff's position, they may not serve a second amended complaint as of right. CPLR § 3025(a). But even if the had, their time for doing so had expired by the time they attempted service. Nor is this court inclined to grant permission under CPLR 3025(b) given the late stage of this litigation. It is clear to this Court that plaintiffs are merely engaging in stall tactics. Indeed, they have been in possession of the necessary facts to state their claims since they started this litigation. Moreover, to the extent that plaintiffs seek to amend any of the causes of action that were dismissed by the 3211 motion and were not reinstated by the Appellate Division, First Department, plaintiffs failed to comply with CPLR § 3211(e)(which requires that a party opposing a 3211 motion to seek leave to replead). In fact, the Appellate Division, First Department, denied their request to replead on this basis. Arts4All, Ltd v. Hancock, supra, 773 N.Y.S.2d at 354

This constitutes the decision, judgment and order of the Court.

September 14, 2004

SO ORDERED

/s/
ROLANDO T. ACOSTA J.S.C.

Zachary R. Greenhill, Esq.
GREENHILL PARTNERS, P.C.

555 Fifth Avenue
New York, New York 10017
Attorneys for Plaintiffs and
Additional Defendants on
Counterclaims

David G. Trachtenberg, Esq.
TRACHTENBERG, RODES & FRIEDBERG, LLP
545 Fifth Avenue
New York, New York 10017
Attorneys for Defendant

APPENDIX X

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK PART 61

Index No. 101123/03

Seq. No. 3

[Filed May 3, 2004]

ARTS4ALL LTD AND RTCAHRD WUMPHRY,

PLAINTIFFS,

-against-

JUDITH L. HANCOCK,

DEFENDANT.

JUDITH L. HANCOCK,

THTRD-PARTY PLAINTIFF

-against-

DANIEL Y. C. NG, ROBERT McBAIN, JOEL MEYERSON, AND PETER OSGOOD,

ADDITIONAL DEFENDANTS)
ON THE COUNTERCLAIMS.)
)

DECISION/ORDER

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing plaintiffs motion for the entry ofjudgment on plaintiffs counterclaim and for an order to strike each and every allegation in the verified amended counterclaims against the additional defendants:

Papers	**Numbered**
Plaintiff's Notice of Motion, Affirmation and Memorandum of Law	**1 - 3 (Exhibit A)**
Defendant's Affirmations in Opposition and Memorandum of Law	**4 - 5 (Exhibits A - M)**
Plaintiff's Reply Affirmation and Memorandum of Law	**6 - 7**

Plaintiff's motion for an order entering judgment on its counterclaim [raising the defense of general release] interposed in its October 0, 2003 motion, has been withdrawn.

Plaintiff's request for an order striking each and every allegation in the amended counterclaims against the additional defendants is also denied inasmuch as the Court grants defendant leave, nunc pro tunc, to file the summons and verified amended counterclaims of December 30,2003. Plaintiff and additional defendants must answer the counterclaims by June 11, 2004.

This constitutes the decision and order of the Court.

April 19,2004

SO ORDERED

/s/ ______________________________
ROLANDO T. ACOSTA J.S.C.

APPENDIX Y

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of September, 2009

Present, HON. CARMEN BEAUCHAMP CIPARICK, *Acting Chief Judge,* ***presiding.***

Mo. No. 2009-708

Arts4All, Ltd.,)
Appellant,)
et al.,)
Plaintiff,)
v.)
Judith L. Hancock,)
Respondent.)
)
Judith L. Hancock,)
Third-Party Respondent,)
v.)
Daniel Y.C. Ng, et al.,)
Third-Party Defendants.)
)

A motion for reargument to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge Lippman took no part.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

Stuart M. Cohen	*Clerk's Office*
Clerk of the Court	*Albany, New York 12207*

Mo. No. 2009-708

[Decided September 8, 2009]

Arts4All, Ltd.,
Appellant,
et al.,
Plaintiff,
v.
Judith L. Hancock,
Respondent.

Judith L. Hancock,
Third-Party Respondent,
v.
Daniel Y.C. Ng, et al.,
Third-Party Defendants.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge Lippman took no part.

APPENDIX Z

NOTE OF ISSUE
M 1-13

Calendar No. (if any) ....
Index No. .... 101123/2003 ....
....SUPREME..... Court, NEW YORK County, N.Y.

[Filed January 13, 2006]

ARTS4ALL, LTD. AND RICHARD	)
HUMPHREY,	)
	)
Plaintiffs,	)
	)
-against-	)
	)
JUDITH L. HANCOCK,	)
	)
Defendant ~~and Counterclaimant~~.	)
	)
JUDITH L. HANCOCK,	)
	)
Counterclaimant	)
	)
-against-	)
	)
DANIEL Y C NG, ROBERT McBAIN,	)
JOEL MEYERSON, AND PETER OSGOOD,	)
	)

Additional Defendants)
On the Counterclaims.)
)

RECEIVED
JAN 13 2006
TRIAL SUPPORT OFFICE

Rolando T. Acosta
Name of Judge assigned

NOTICE FOR TRIAL

- ☒ Trial by jury demanded
  - ☐ Of all issues
  - ☐ Of issues specified below
  - ☐ Or attached hereto
- ☐ Trial without jury

Filed by attorney for Plaintiffs

Date summons served January 24, 2003

Date service completed January 24, 2003

Date issue joined February 27, 2003

NATURE OF ACTION OR SPECIAL PROCEEDING

* * *

☒ Contract

* * *

Amount demanded $975,000

Other relief

Insurance carrier(s) if known: None

Special preference claimed under

on the ground that N/A

N/I APPROVED
FILE BY
1-13-06
JP

Attorney(X) for Plaintiff(s) XXXXXXXXXXXX and additional def. on counterclaims Peter Osgood	GREENHILL PARTNERS, P.C. 555 Fifth Avenue New York, New York 10017
Phone No.:	(212) 661-5500
Attorney(X) for Defendants (X) XXXXXXXXXXXX ~~Counterclaimant~~ Judith L. Hancock	TRACHTENBERG, RODES & FRIEDBERG, LLP 545 Fifth Avenue New York, New York 10017 (212)- 972 2929
Phone No.:	

CERTIFICATE OF READINESS FOR TRIAL
(Items 1-7 must be checked)

		Completed	Waived	Not required
1.	All pleadings served	X		
2.	Bill of particulars served			X
3.	Physical examinations completed			X
4.	Medical reports exchanged			X
5.	Appraisal reports exchanged			X
6.	Compliance with Rules in matrimonial actions (22 NYCRR 202.16)			X
7.	Discovery proceedings now know to be necessary completed	X		

8. There are no outstanding requests for discovery.

9. There has been a reasonable opportunity to complete the foregoing proceedings.

10. There has been compliance with any order issued pursuant to the Precalendar Rules (22 NYCRR 202.12).

11. If a medical malpractice action, there has been compliance with any order issued pursuant to 22 NYCRR 202.56.

12. The case is ready for trial.

Dated: January 13, 2006

/s/
Signature — type name below.
ZACHARY R. GREENHILL, ESQ.
GREENHILL PARTNERS, P.C.

Attorney(s) for	Plaintiffs and Additional Def. on Counterclaims Peter Osgood
Office & P.O. Address	555 Fifth Avenue New York, New York 10017

* * *

APPENDIX AA

Excerpts from Exhibit 1 to Greenhill Affirmation dated May 25, 2006 - Transcript of Proceedings held before the Honorable Rolando T. Acosta on May 11, 2006 [pp. SR294, SR300, SR301, SR328]

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK:
CIVIL TERM PART 61

INDEX NUMBER: 101123/03

[Dated May 11, 2006]

ARTS4ALL, LTD. AND RICHARD HUMPHRY,)
Plaintiffs,)
)
-against-)
)
JUDITH L. HANCOCK,)
Defendant and Counterclaimant.)

JUDITH L. HANCOCK,)
Counterclaimant)
)
-against-)
)
DANIEL Y. C. NG, ROBERT McBAIN,)
JOEL MEYERSON, AND PETER OSGOOD,)

Additional Defendants)
on the Counterclaims.)
)

71 Thomas Street
New York, New York
May 11, 2006

BEFORE :
HONORABLE ROLANDO T. ACOSTA, Justice.

APPEARANCES:

GREENHILL PARTNERS, P.C.
Attorney for the Plaintiffs and
Additional Counterclaim Defendant Osgood
555 Fifth Avenue
New York, New York 10017
BY: ZACHARY R. GREENHILL, ESQ.

TRACHTENBERG, RODES & FRIEDBERG, LLP
Attorneys for Defendant Hancock
545 Fifth Avenue
New York, New York 10017
BY: DAVID G. TRACHTENBERG, ESQ.
JUDITH HANCOCK, ESQ.

MARGARET BAUMANN
Official Court Reporter

mb

* * *

[p.7] THE COURT: Likewise, Ms. Hancock, is there anything you do not understand about the Court's unwillingness to dismiss the one remaining cause of [p.8] action of plaintiff? Is there anything that is not clear to you with respect to the Court's order?

MR. TRACHTENBERG: Your Honor, your order is entirely clear. * * *

* * *

[p.35] THE COURT: I am hereby withdrawing my previous order with respect to the videotape and the financial documents, of the financial documents.

I will issue a decision on this matter within 60 days.

* * *

APPENDIX AB

Affirmation of Zachary R. Greenhill, for Plaintiffs and the Additional Defendant on the Counterclaims Peter Osgood, in Opposition to Motion by Defendant/Counterclaimant Judith L. Hancock to Strike the Complaint, among other relief, dated April 3, 2006

[pp. SR26 - SR50]

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 101123/03

[Dated April 3, 2006]

ARTS4ALL LTD AND RICHARD HUMPHREY,)
)
)
Plaintiffs,)
)
-against-)
)
JUDITH L. HANCOCK,)
)
Defendant and Counterclaimant.)

JUDITH L. HANCOCK,)
)
Counterclaimant,)
)

-against-)
)
DANIEL Y. C. NG, ROBERT McBAIN,)
JOEL MEYERSON, AND PETER OSGOOD,)
)
Additional Defendants)
On the Counterclaims.)
)

AFFIRMATION

ZACHARY R. GREENHILL, ESQ., an attorney duly admitted to practice law in the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am an officer of Greenhill Partners, P.C. attorney for the plaintiffs ARTS4ALL LTD and RICHARD HUMPHREY and the additional defendant on the counterclaims PETER OSGOOD [collectively "plaintiffs/OSGOOD"] fully familiar with the facts and circumstances of the above captioned matter by reason of personal knowledge of events and my review of the file.

2. This affirmation is submitted in opposition to the motion of defendant and counterclaimant JUDITH L. HANCOCK ["defendant- counterclaimant"] to strike the complaint, strike OSGOOD's answer, enter a default judgment and order an inquest for defaulting on discovery orders, failing to provide documents, and "contumacious, willful and bad-faith conduct". The discovery orders identified are an order, dated May 19, 2005 directing the production of financial information; an order, dated October 31, 2005 that all written discovery must be complete by November 30, 2005; and

a January 4, 2006 order which allegedly says that defendant-counterclaimant must be given videotapes *which do not exist* of the annual shareholders' meeting which took place on December 28, 2005. Defendant-counterclaimant also makes various other complaints that the document discovery provided is either unsatisfactory or the deposition testimony did not elicit the evidence which defendant-counterclaimant wants.

3. Defendant-counterclaimant's motion should be denied because:

a. the motion relies on the unlawful practice of law because defendant-counterclaimant's demand for answers to interrogatories and "second" demand for admissions of fact and as to documents are neither signed by the attorney-of-record nor by any attorney at all;

b. the unlawful discovery demands are inextricably intertwined with all of defendant-counterclaimant's other discovery which renders all of defendant-counterclaimant's discovery demands nugatory and void; and

c. It is beyond cavil that there is here *scienter:* defendant-counterclaimant attempts to conceal the unlawfully made interrogatory demand by providing only an incomplete copy of plaintiffs/OSGOOD's answers, which do not include the unlawfully executed signature page of defendant-counterclaimant's demand or the notice in plaintiffs/OSGOOD's response that the demand was null and void because it was not signed by an attorney.

4. Even assuming, *arguendo,* that unlawful practice of law does not render a party's discovery nugatory and void, defendant-counterclaimant's motion to strike based on the failure to comply discovery orders should be denied because there is compliance with all court orders:

a. there is no violation of the May 19, 2005 order because the financial information does not exist, as is established by the affidavit of Dan Schwartz, ARTS4ALL's Certified Public Accountant, attached hereto as Exhibit "1";

b. there is no violation of the October 31, 2005 order because, by orders dated November 17, 2005 and November 18, 2005, plaintiffs/OSGOOD's document production was limited to those documents which concerned the Ohio: State of the Arts" initiative and all e-mails which concerned defendant-counterclaimant, and these documents were timely produced as well as a total of 6,223 pages of documents as the affidavit of HUMPHREY establishes, attached hereto as Exhibit "2";

c. plaintiffs/OSGOOD turned over 5,440 pages of documents by November 30, 2005 and by December 7, 2005, had turned over a total of 6,223 pages of documents, well beyond the scope of the court's November 2005 orders;

d. there is no violation of a January 4, 2006 order directing copies of the videotapes *which do not exist* of the 2004 annual meeting of ARTS4ALL be provided to defendant-counterclaimant because:

i. there is no such order - the court ordered a viewing, only, with leave to return to request a copy and discuss its cost;

ii. no copies exist; the feed remains in the original format as it was captured;

iii. defendant-counterclaimant has viewed the captured raw images and sound, unedited;

iv. this proprietary information has never been converted into a format to be recorded onto videotapes or any other media; and

v. release to defendant-counterclaimant who has admitted that she sought to establish a rival company to compete with ARTS4ALL, means distribution cannot be controlled.

5. Defendant-counterclaimant's other complaints about discovery are the result of questions asked without proper foundation or appear to be based on an unwillingness to accept that discrepancies in testimony between witnesses during depositions are the norm, poor recollection of events which took place three or more years ago happen, that which is the subject of this lawsuit has not been the primary focus of the business involved and that all of this are grist for cross-examination at trial but not a basis for a motion to dismiss for discovery default.

6. The legal issues raised in opposition to the motion are properly addressed in plaintiffs/OSGOOD's memorandum of law submitted contemporaneously with this affirmation.

STATEMENT OF FACTS

Arts4All

7. ARTS4ALL, LTD ["ARTS4ALL"] is a Delaware corporation, authorized to do business in New York and is in the business of providing proprietary platforms for quality interactive video/sound for cultural content. ARTS4ALL7s potential customers are schools and colleges, and the intended recipients of its content include children, young adults and teachers.

Richard Humphrey

8. RICHARD HUMPHREY ["HUMPHREY"] is ARTS4ALL's president.

Peter Osgood

9. PETER OSGOOD ["OSGOOD"] is a director of co-plaintiff ARTS4ALL.

JUDITH L. HANCOCK

10. JUDITH L. HANCOCK ["defendant-counterclaimant"] is an attorney admitted to practice in the State of New York and formerly the general to ARTS4ALL affording confidential legal services. Defendant-counterclaimant was fired for cause.

David G. Trachtenberg, Esq.

11. David G. Trachtenberg ["Trachtenberg"] is an attorney admitted to the practice of law in the State of New York, and the attorney-of-record for defendant-counterclaimant. He is a member of Trachtenberg

Rodes & Friedberg, LLP. Mark Gustafson is employed by either Trachtenberg, Trachtenberg Rodes & Friedberg, LLP. or both. According to the New York State Office of Court Administration Mr. Gustafson is not an attorney licensed to practice in the State of New York.

The Release

12. Defendant-counterclaimant has already made a CPLR 3212 motion to strike OSGOOD's affirmative defense of Release. This was denied on the finding of the court that there is an issue of fact. Defendant-counterclaimant admits that she signed the Release. The Release bars "any and all charges, claims and expenses" "arising from" defendant-counterclaimant's employment, by ARTS4ALL including the counterclaims. Although defendant-counterclaimant claims that work done as a consultant is unrelated to receipt of her stock, this fiction is belied by the initial counterclaims as alleged by defendant-counterclaimant's attorney-of-record. A copy of this pertinent portion of the counterclaims is attached hereto as Exhibit "3"; a copy of the Release is attached hereto as Exhibit "4".

STATEMENT OF PERTINENT PROCEDURAL FACTS

Defendant-Counterclaimant's Motion

13. This motion of defendant-counterclaimant is 7 inches thick. It consists of a 7 page affidavit from the attorney-of-record, Trachtenberg; a 172 page affidavit from defendant-counterclaimant which consists of a 95 page affidavit, bound to which are 80 pages in 10

"schedules"; 43 "exhibits", in 2 bound volumes; and 23 "annexes", many of which consist of multiple documents, in 2 bound volumes.

The Complaint

14. On January 24, 2003, the complaint was served. It seeks damages for breach of contract because of an anonymous memorandum which defendant-counterclaimant admits was sent by defendant-counterclaimant to senior Republican Party officials of the State of Ohio. The memorandum did not disclose that defendant-counterclaimant is an attorney for ARTS4ALL fired for cause. It destroyed an initiative then being negotiated between ARTS4ALL and that state. This initiative is known as "Ohio: State of the Arts". A copy of the complaint is attached hereto as Exhibit "5".

The Counterclaims

15. On February 27, 2003, the counterclaims, with the answers, were served.

16. On December 31, 2003, nunc pro tunc the verified amended counterclaims were served. Defendant-counterclaimant's verified amended counterclaims allege both wrongful termination and violation of shareholder's rights. [ΔΔ¶¶ 4, 8, 16, 40, 41, 44, 45-58, 67-99, 102-111, 113-116, 118-129, 131-137, 140-150, 152-156, 166][1] Defendant-counterclaimant

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[1] Numbers in parenthesis, preceded by the symbols ΔΔ¶¶ refer to paragraphs in the verified amended counterclaims. This document

does not sue in the name of the corporation. Rather, defendant- counterclaimant seeks to recover attorney's fees which defendant-counterclaimant has created as damages, which defendant-counterclaimant generates by her own work, *"pro se"*, on her own case. Defendant-counterclaimant is the only witness on the counterclaims and is therefore an *advocate-witness*.

The Demand for Answers to Interrogatories Made by the Unlawful Practice of Law

The Demand for Answers to Interrogatories Is Neither Signed by the Attorney of Record nor by any Attorney at All

17. On October 18, 2005, more than 2 years and 6 months after service of the motion/counterclaims, by "fax" at 6:26 p.m., defendant-counterclaimant's attorney-of-record served a "First Demand for Answers to Interrogatories." Oddly, in a cover letter, there is a complaint because lobby security would not permit access after hours to the building in which the plaintiffs/OSGOOD's counsel's office is located. A copy of the cover letter and demand for answers to interrogatories is attached as Exhibit "6".

18. This demand is not signed by the attorney-of-record, Trachtenberg. Rather, his name is signed by his administrative assistant, who is identified by the initials "MG" immediately after where Trachtenberg's name is signed in pen and ink. On information and belief, this refers to Mark Gustafson.

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appears in "Annex C" in support of defendant-counterclaimant's motion.

19. That Trachtenberg was not available to supervise Mr. Gustafson on either October 18, 2005 when the demand for answers to interrogatories was apparently signed and served or on the following day, when a "hard copy" was apparently served, is verified under oath by the defendant-counterclaimant in answers to the plaintiffs/OSGOOD's second set of interrogatories, also served on October 19, 2005. (Trachtenberg's name is also signed in pen and ink in that document by "MG"). A copy of the pertinent portion of these answers to interrogatories is attached hereto as Exhibit "7".

Concealment of the Defendant-counterclaimant's Demand; instead an incomplete version of Plaintiffs/Osgood's Answers is submitted to the Court

20. Absent from the papers in support of this motion is defendant-counterclaimant's demand for answers to interrogatories. This, despite the fact that defendant-counterclaimant relies heavily on this demand for the relief sought.

21. Instead of defendant-counterclaimant's demand, an incomplete version of plaintiffs/OSGOOD's answers to that demand is submitted. The incomplete version conceals that the demand is unlawfully made because it does not include the signature page on which Trachtenberg's name is signed in pen and ink by "MG." A copy of this incomplete version of plaintiffs/OSGOOD's answers to the interrogatories is attached as defendant-counterclaimant's Exhibit "6" in support of the motion. A complete copy of the answers to interrogatories of plaintiffs/OSGOOD is attached hereto as Exhibit "8".

Plaintiffs/Osgood's Actual Answers: Objection is Made because the Demand is not Signed by an Attorney and is therefore a Legal Nullity

22. In the actual answers to interrogatories served by plaintiffs/OSGOOD, objection is specifically made on the basis that the demand for answers to interrogatories is a legal nullity without force of law because it is not signed by an attorney as required by the Civil Practice Law and Rules, 22 NYCRR 130-1.1, and the Code of Professional Responsibility. [DR- 104]

23. Despite this notice of defect, no attempt was made to cure.

Objections because the Interrogatories are Overly Broad, Unduly Burdensome and Prolix

24. Plaintiffs/OSGOOD objected to the interrogatories as well because the demand consists of 6 definitions which defendant-counterclaimant demands be applied to each of 83 interrogatories, many divided into subparts and these subparts are in turn divided into still more subparts, rendering them overly broad, unduly burdensome and prolix exponentially.

25. Certain interrogatories demand that plaintiffs/OSGOOD give evidence, in answer to a single interrogatory, for periods of up to five years, to be set for separately yet in the same answer. Other interrogatories demand that plaintiffs/OSGOOD give evidence in answer to the same interrogatory, for periods of up to ten years, on a month to month basis, to be set forth separately yet in the same answer.

26. The definitions define HUMPHREY and OSGOOD not individually but collectively with "any and all persons," never identified, "acting in concert" - whatever that means in a civil law context. ARTS4ALL is defined collectively with Mastervision International Ltd. Both of these names in turn include "any and all" of their "officers, employees, agents, representatives, subsidiaries, partners and affiliates" never identified and without limit as to time. This would be a period of ten years, dating back to 1996 when Mastervision International Ltd. apparently began to do business in New Jersey.

27. Further, the interrogatories demand "all" documents, use "and", "or", "and/or" to further expand their scope and, as a result, their number is incalculable and the demand stretches the limits of comprehension.

28. Certain interrogatories appear verbatim in counterclaimant's notice to admit, served on October 14, 2005 - defendant-counterclaimant's fourth such notice - which, by definition, means that counterclaimant requires no further discovery as to them. These the interrogatories assume facts and are rife with conclusions without factual predicates stated.

Specific Objections Divided into Schedules Never Submitted in the Answers Provided by Defendant-Counterclaimant to the Court

29. Nevertheless, in order to demonstrate good faith cooperation in discovery, plaintiffs/OSGOOD tried to answer the interrogatories. Rather than reiterate the objections specific to each interrogatory, these were divided into categories and attached as exhibits to the

answers. The interrogatories to which plaintiffs/Osgood objected because each demands the same information year by year for up to five years in the same interrogatory was set forth in Exhibit "A"; the interrogatories to which plaintiffs/Osgood object because each demands the same information, month by month, for up to 10 years in the same interrogatory was set forth in Exhibit "B"; those interrogatories which were multiplied in number exponentially by the use of sub-parts, subsections and the words "and", "or" as well as "and/or" were set forth in Exhibit "C"; the interrogatories which were without limitation as to time and expanded by the use of subparts and subsections as well as the use of the words "and", "or", "and/or" were set forth in Exhibit "D"; and the interrogatories which demand answers which the defendant-counterclaimant already knew and which the interrogatories which charge ARTS4ALL, HUMPHREY and OSGOOD with knowledge of individuals unknown, in circumstances never described, was set forth in Exhibit " E." Not one of these schedules is provided to the court with the plaintiffs/OSGOOD's answers to interrogatories.

30. The answers to the defendant-counterclaimant's interrogatories specifically said that these would be based on the recollections, only, of HUMPHREY, OSGOOD and the files of ARTS4ALL. Nevertheless, on December 5, 2005, Mr. Daniel Ng was deposed by defendant-counterclaimant, not the attorney-of-record (who was however present and gave guidance throughout the deposition, thereby prolonging it). Mr. Ng testified that he had never seen the defendant-counterclaimant's demands for answers to interrogatories. Defendant-counterclaimant now asks the court to grant the instant motion because

defendant-counterclaimant wanted the demand to be shown to Mr. Ng but it wasn't. [Affidavit of Hancock, Sworn May 15, 2006, pages 68-69] This is not a basis on which to grant the motion.

31. It is beyond cavil that the demand for answers to interrogatories of defendant-counterclaimant is nugatory and void. Even defendant-counterclaimant, by the concealments of the demand apparently admits this is so. As a result, each and every objection to the discovery of plaintiffs/OSGOOD which is assailed based on the answers to those interrogatories must fail as they rely on a discovery demand made by the unlawful practice of law.

The "Second Notice to Admit Facts and Genuineness Of Documents" made by Unlawful Practice of Law

32. On October 18, 2005, more than 2 years and 6 months after service of the counterclaims, defendant-counterclaimant served a "Second Notice to Admit Facts and Genuineness of Documents".

33. This demand, too, is not signed by the attorney-of-record, Trachtenberg. Once again, his name appears to be signed by his administrative assistant, Mr. Gustafson, because the initials "MG" appear immediately after where Trachtenberg's name is signed in pen and ink. As earlier discussed, Mr. Trachtenberg was not available to supervise Mr. Gustafson on October 18, 2005 when this "second" notice for admissions was signed and served on plaintiffs/OSGOOD.

34. Once again, Plaintiffs/OSGOOD, in their response, objected to the "second" notice because it is not signed by an attorney as required by the Civil Practice Law and Rules, 22 N.Y.C.R.R. 130-1.1, and the Code of Professional Responsibility. [DR- 104]

35. Once again, nothing was done by defendant-counterclaimant to cure this defect, despite notice.

36. The documents which defendant-counterclaimant sought to have admitted or denied by this notice, made by the unlawful practice of law, therefore need not be admitted or denied henceforth in the litigation because of the taint of the unlawfully made "second" notice. These documents include: The amendment to the shareholder's agreement on which defendant-counterclaimant stakes her claim as an unrestricted shareholder; the correspondence which defendant-counterclaimant says establishes that defendant-counterclaimant was denied financial information at the July 16, 2002 annual shareholders meeting and notice of that meeting, what defendant-counterclaimant claims is a "draft" a profit and loss statement for 2001; the stockholder's ledger; ARTS4ALL's bank records, showing transfers of funds; and various pages purportedly from the ARTS4ALL web site. Any discovery defaults claims on the bases of these documents should be summarily ignored by the court in the consideration of this motion because of the unlawfully made demand.

37. That said, this does not mean that plaintiffs/OSGOOD will not admit or deny these documents as part of their own proof. The key distinction here is that it is plaintiffs/OSGOOD can

chose whether or not to do so. But because the "second" notice is unlawfully made, defendant-counterclaimant cannot. To otherwise hold would be to find that a party can be absolved for the unlawful practice of law.

A CPLR 3120 Notice First Served More Than Two Years and Six Months After Counterclaims Commenced

38. On October 14, 2005, more than two years and six months after service of the answer with counterclaims, defendant-counterclaimant served a "First Request for Production of Documents under CPLR 3120" [hereinafter the "CPLR 3120 notice"].

39. The CPLR 3120 notice consists of 17 instructions and definitions and 60 categories of documents. The word "all" precedes all but one of the sixty demands. The "main" definitions include within them sub-definitions within which are still more sub-definitions, some of which include the "main" definitions and are three pages in length. The CPLR 3120 notice claims that it demands documents for a period of 5 years, from June 1, 2000 through October 14, 2005. In fact, it demands every scrap of paper that ARTS4ALL has concerning ARTS4ALL and the prior company, Mastervision International, Ltd., for 10 years, as hereinafter explained.

"Documents"' and "Communications"

40. The defendant-counterclaimant's CPLR 3120 notice demands that plaintiffs/OSGOOD apply the definition of "document" and "communication" to each category in which either word appears. The CPLR 3120 notice demands:

"L. The terms 'communication,' 'document,' 'person,' 'concerning,' 'identify,' 'all/each,' and 'and/or' shall be defined and interpreted as set forth in Rule 26.3 of the Local Civil Rules of the Rules of the United States District Court for the Southern District of New York.

M. In addition, and without limiting the generality of paragraph L above, the term 'document' when used to refer to communications shall expressly be defined to include, without limitation, all non-identical drafts of any such communications, including, without limitation, contracts, correspondence, e-mails, facsimile transmissions, hand-written notes of oral conversations, electronic or computerized recording of notes of oral conversations, photographs, sound recordings, and videotapes.

N. Please produce all responsive documents in your possession, custody or control, including, without limitation, any non-privileged documents within the possession, custody or control of any of your attorneys or other agents. A document shall be deemed to be in your control if you have the right to secure the document or copy thereof from any other person having possession or custody thereof. In addition, inasmuch as these requests are continuing in nature, please further produce all responsive documents that may subsequently come into your or any of your agents' possession, custody or control.

> O. If any otherwise responsive document was but is no longer in existence or in your possession, custody or control, identify its current or last known custodian and describe in full the circumstances surrounding its disposition from your possession or control."

41. The word "document" appears in 45 demands to which plaintiffs/OSGOOD, in their response, objected: no. 1, 2, 3, 4, 6, 7, 9, 11, 15, 16, 17, 18, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60. The word "communication" appears in 12 demands to which plaintiffs/OSGOOD, in their response, objected: no. 4, 6, 9, 15, 16, 23, 27, 30, 31, 32, 54, 55. Because "document" and "communication" are, by defendant-counterclaimant's definition, synonymous, the definition of "communication" must be applied in the 45 demands in which the word "document" appears as well.

Arts4All and Mastervision

42. The definition of "Arts4All" fails to identify any individual or individuals to whom the term "Arts4All" refers and incorporates within its definition of Mastervision International Ltd., the corporation which existed from 1996 to on or about 2000. Hence, although the CPLR 3120 notice says it only seeks documents for 5 years, in fact, it demands them for 10 years because the definition of ARTS4ALL includes Mastervision International, Ltd. The CPLR 3120 notice demands:

> "A. The term 'Arts4All'refers to Arts4All, Ltd., including its predecessor entity Mastervision International Ltd., and any and all

> of its officers, directors, employees, agents, representatives, subsidiaries, partners, and affiliates."

43. The word "Arts4All" and, therefore also Mastervision International, Ltd., appears in 25 demands to which plaintiffs/OSGOOD, in their response, objected: no. 1,3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 18, 19, 22, 27, 28, 33, 34, 39, 40, 47, 48, 49, 50.

44. Bluntly, given the broad definition of "document" and "communication", and the definition of "ARTS4ALL", defendant-counterclaimant's complaint about document production means that ARTS4ALL did not produce every scrap of paper it has for the last 10 years as to both ARTS4ALL and Mastervision International, Ltd., even though the CPLR 3120 notice is impossible to answer without a claim of default.

Humphrey

45. HUMPHREY is not limited to plaintiff HUMPHREY because "Humphrey" is defined as including "any and all persons" "acting in concert with him". No identification is made of who these individuals are. The term "acting in concert" can mean virtually anything in civil law. The definition says:

> "B. The term 'Humphrey' means Richard Humphrey and any and all persons acting in concert with him."

46. "Humphrey" appears in 19 demands to which plaintiffs/OSGOOD, in their response, objected: no. 6, 12, 13, 14, 17, 27, 32, 33, 39, 40, 41, 42, 43, 46, 51, 52, 55, 56, 57.

Osgood

47. The additional defendant on the counterclaims OSGOOD is also not just OSGOOD because the definition of "Osgood" also includes "any and all" persons "acting in concert with him". Again, whatever that means. The definition says:

> "C. The term 'Osgood' means Peter Osgood and any and all persons acting in concert with him."

48. "Osgood" therefore appears in 9 demands to which plaintiffs/OSGOOD, in their response, objected: no. 6, 12, 14, 17, 27, 52, 55, 56, 57.

49. Because HUMPHREY, OSGOOD and ARTS4ALL may be deemed to be "acting in concert" with each other, each appear in the CPLR 3120 notice, in 34 demands.

Privileged Documents

50. The breadth of the definition of the word "document" and "communication" demands every scrap of paper in plaintiffs/OSGOOD's counsel's files, or an identification of each, for a 10 year period by an onerous privilege log. Defendant-counterclaimant surely knows that the CPLR 3120 notice demands plaintiffs/OSGOOD's entire file. If plaintiffs/OSGOOD attempted to create the privilege log as demanded, with all of its qualifications, it would be a virtually insurmountable task in the short term and constitute an extraordinary expense, whenever completed. And, after that document was created, without doubt defendant-counterclaimant would make a motion to

compel the production of the documents to this court, requiring production and in camera inspection.

51. Prior to the deposition of Mr. Ng on a message was sent to Hong Kong, requesting that a check of the files of Mr. Ng be made to find any documents concerning this litigation. That review of Mr. Ng's files was, in fact, made. The result was that the original of the memorandum, dated August 19, 2002, which was sent by defendant-counterclaimant to Mr. Ng was located. This is the memorandum on which defendant-counterclaimant relies to establish the claim of status as a whistle blowing shareholder.

52. Immediately prior to the deposition of Mr. Ng on December 5, 2005, counsel for plaintiffs/OSGOOD said, on the record to the attorney-of-record of the defendant-counterclaimant as well as to defendant-counterclaimant, that a search had been made of Mr. Ng's files. Nevertheless, defendant-counterclaimant urges that the court grant this motion on the basis that Mr. Ng, personally, was never asked to check his files for documents. [Affidavit of Hancock, Sworn March 15, 2006, pages 13-17]. A copy of this portion of the transcript is attached hereto as Exhibit "13".

53. Plaintiffs/OSGOOD served their objections to the first demand for production of documents on November 3, 2005. A copy of the CPLR 3120 notice and plaintiffs/Osgood's objections is attached hereto as Exhibits "11" and "12" respectively.

First Service of Deposition Notice For Plaintiffs/OSGOOD, Without Document Demand, More Than Two Years and Six Months After Counterclaims Commenced

54. On October 24, 2005, more than two years and six months after defendant-counterclaimant's answer with counterclaims was served, a notice to take deposition upon oral examination of plaintiffs/ OSGOOD was served by defendant-counterclaimant. No demand was made for the production of documents at the deposition was included in this notice. There was therefore no obligation, pursuant to the notice to take deposition upon oral examination to provide any documents at those depositions.

55. All of these depositions were held after the November 30, 2005 deadline for document discovery. Prior to the date when defendant/counterclaimant concluded the deposition of plaintiffs/OSGOOD, 6,223 pages of documents had been received by defendant/counterclaimant.

Service of the Fourth Notice to Admit which is Identical to the First and Second Requests for Admissions Already Struck by Prior Order

56. On October 14, 2005, defendant-counterclaimant also served a "notice to admit". In fact, this is the fourth request for admissions which was served by defendant-counterclaimant by that date. The first two requests for admissions were served 793 days after the commencement of the counterclaims; the third request for admissions was served 841 days after the commencement of the counterclaims. The

admissions sought by the notice are virtually identical to those struck by order, dated September 29, 2005. A copy of defendant/counterclaimant's notice and plaintiffs/OSGOOD's response is attached as Exhibits "14" and "15", respectively.

The October 31, 2005 Hearing; Written Discovery to be Completed by November 30, 2005

57. On October 31, 2005, a hearing was held concerning discovery.

58. In addition to the court imposing a sanction of $500.00 on defendant-counterclaimant for failure to appear on October 24, 2005 for deposition, as earlier discussed the court ordered that all written discovery be exchanged by November 30, 2005. However, the court did not order the annual shareholders meeting held by November 30, 2005. What the court ordered was that notice be given by November 30, 2005 of the annual shareholders meeting. The court said:

> "The responses that are due to all the written discovery devices that have been exchanged by the parties shall be due no later than November 30, 2005 ...
>
> * * *
>
> [TRACHTENBERG]: ... There has still been no shareholders meeting and in the order of September 29th Your Honor stated we are to receive current or more recent interim financial data to the same extent it was given to any other shareholder. Mr. Humphrey, of course, is the chief executive officer of the company.

> THE COURT [sic]: It's inconceivable for six months he has not received any --
>
> MR. GREENHILL: We haven't done a profit and loss statement. We are currently in negotiations with various companies. We don't issue interim profit and loss statements. We have a Quickbooks running balance[.] [sic] [W]ith [sic] with regard to holding the shareholders meeting. We have no objection to that, Your Honor, but in the two prior orders from you, you haven't lifted the stay. You've said when it happens. Perfectly willing to do it. If the court says no stay go ahead and notice the shareholders meeting, we will do it right away. In fact, now that I have a date that Mr. Ng is going to be in the United States I'll notice it for immediately before or after that deposition. That is fine by me.
>
> THE COURT: Let me just inform you that the November 30th deadline applies to that as well.
>
> MR. GREENHILL: That's fine."

A copy of this portion of the transcript is attached hereto as Exhibit "16".

59. In sum, the court directed that the annual meeting be noticed by November 30, 2005.

60. On November 23, 2005, the annual meeting was noticed. By error, it was noticed for December 5th, the date of the deposition of Mr. Ng. The attorney-of-record of defendant-counterclaimant brought this error to the attention of the plaintiffs/OSGOOD's counsel and an

amended notice was immediately sent out. Hence, the plaintiff ARTS4ALL complied with the order of the court by issuing a notice for the annual meeting both before November 30, 2005.

61. That annual meeting took place on December 28, 2005.

The November 17th Order That All Documents Concerning the Ohio: State of the Arts Initiative be Provided by Close of Business on November 18, 2005

62. On November 17, 2005, counsel for HUMPHREY appeared in court before Your Honor concerning the scope of the document demand of the defendant-counterclaimant. Your Honor ordered that ARTS4ALL provide as many documents as possible about the Ohio: State of the Arts initiative by close of business the following day, November 18, 2005. Further, the court granted the application of plaintiffs/OSGOOD's counsel for a prioritized list in order to assure that documents would be produced in priority order. The court directed that a prioritized list of documents be provided. On November 18, 2005, the purportedly prioritized list was received. In Chambers, Your Honor reviewed the list and heard argument as to the impossibility of it being satisfied by HUMPHREY and defendant-counterclaimant's attorney of record. Your Honor reviewed the list and ordered that ARTS4ALL did not have to provide any more documents beyond the e-mails in which defendant-counterclaimant's name was mentioned. A copy of the affidavit of HUMPHREY describing the

document production and rebutting the "spoliation claim" is attached hereto as Exhibit "2".

63. After November 30th, even though no longer required, ARTS4ALL continued to turn over documents until a total of 6,223 pages were provided. Attached hereto as Exhibit "9" are letters and a portion of the transcript of December 7, 2005 pertinent to the process.

Service of the Order to Show Cause on Osgood

64. On March 17, 2006, the order to show cause with the affidavit of defendant-counterclaimant was directly served on OSGOOD. The second page says:

> "5. The very conduct which this Court has found to be 'abhorrent' [fn1] and which has caused the court to describe this litigation as unlike any other the Court has experienced [fn2] . . ."
>
> Footnote 1, says: "During an oral argument held on June 23, 2005, the Court stated 'there is no question, I'm not happy with Arts4All. I think their tactics are abhorrent. I believe the way they have conducted themselves in the course of this trial is -- I'm not even going to put a label on it."
>
> Footnote 2, says: "During a proceeding on September 29, 2005, the Court stated 'I have to tell you folks that I have reached my limit. Never has that happened to me yet in eight years as a judge," referring to the conduct of Arts4All in the litigation.

IN OPPOSITION TO THE MOTION

Unlawful Legal Practice Merits Summary Denial of the Motion

65. It is beyond cavil that defendant-counterclaimant's demand for answers to interrogatories and the second notice to admit facts and the genuineness of documents is signed by a non-lawyer and next served on plaintiffs/OSGOOD.

66. Defendant-counterclaimant thereby obtained evidence and admissions when plaintiffs/OSGOOD served their responses. Now, defendant-counterclaimant is using the evidence obtained by the unlawfully made demand for answers to interrogatories to claim plaintiffs/OSGOOD have committed perjury, attacking both the answers and using the answers to attack plaintiffs/OSGOOD's witnesses's deposition testimony as well. The same *modus operandi* is used for the second notice: defendant-counterclaimant is attacking plaintiffs/ OSGOOD for failing to admit the documents are genuine. These documents in the "second notice" relate to other documents of plaintiffs/OSGOOD's claimed to be missing.

67. It is also beyond cavil that defendant-counterclaimant knows that it served an unlawfully made interrogatory demand because it did not provide a copy of that demand in the 80 pages of schedules attached to defendant-counterclaimant's affidavit, in the 43 "exhibits" in the two bound exhibit volumes, or in the 23 "annexes" many of which consist of multiple documents which are also bound in two volumes. Instead, defendant-counterclaimant served

plaintiffs/OSGOOD's answers to the missing demand, albeit incomplete.

68. In sum, there is here little doubt that there was here a prima facie unlawful practice of law. The motion should be summarily denied and because these discovery devices, unlawfully made, are used to attack plaintiffs/OSGOOD's and Mr. Ng's deposition testimony and vice versa, the objections relating to that testimony are nugatory and void as well. [DR 1-104(d)]. As defendant-counterclaimant attempts to do the same with the notice to admit, all objections as to the authenticity of documents are nugatory and void also.

Plaintiffs/OSGOOD Violated No Court Orders and Produced Documentary Discovery Above and Beyond That Required by the Orders of this Court

The May 19, 2005 Order

69. There is no violation of the May 19, 2005 order as claimed by the defendant-counterclaimant. The financial information which defendant-counterclaimant insists must exist in fact does not exist. This is established by the affidavit of the certified public accountant of ARTS4ALL.

70. That accountant also explains the reason that it does not exist: it is because of circumstances beyond the control of ARTS4ALL. Third parties have not yet provided the information necessary to make the adjusting journal entries necessary to complete statements in final. Defendant-counterclaimant has repeatedly sought sanctions and attorney's fees for

providing documents which are in "draft". Defendant-counterclaimant, therefore, cannot complain because here plaintiffs/OSGOOD are prudent in making sure that any financial information provided to defendant-counterclaimant is accurate.

The October 31, 2005 Order

71. There is no violation of the October 31, 2005 order of the court that plaintiffs/OSGOOD produce their documents by November 30, 2005. Defendant-counterclaimant apparently, inadvertently though conveniently, forgot the court appearance of November 17, 2005, at which the plaintiffs/OSGOOD were told they need only produce the documents pertinent to the Ohio: State of the Arts initiative. Also apparently forgotten is the order that defendant-counterclaimant provide to plaintiffs/OSGOOD a list of documents to be provided in priority order, which was served on the morning of November 18, 2005. This list is attached to the Humphrey affidavit as Exhibit "A". That afternoon, Your Honor found the list so unresponsive and prolix that it limited plaintiffs/OSGOOD's further discovery to e-mails with defendant-counterclaimant's name on them.

72. By close of business on November 18, 2005, plaintiffs/OSGOOD turned over 1,350 pages of documents.

73. By November 28, 2005, plaintiffs/OSGOOD had provided 5,440 pages of documents and by December 7, 2005, 6,223 pages of documents in response to a CPLR 3120 notice which is so exponentially broad that it is impossible to completely satisfy.

No Violation of January 4,2006 Order

74. There is no violation of a January 4, 2006 order directing copies of videotapes of the 2004 annual meeting of ARTS4ALL be provided to defendant-counterclaimant because there was no such order. The court ordered that defendant-counterclaimant be allowed to view the recording of that meeting. This defendant-counterclaimant has done that. No order was made that plaintiffs/OSGOOD should provide copies. Indeed, had such an order been issued it would have been memorable because no copies exist. This proprietary information has never been converted into a format which is capable of being copied against onto any other media. Here, defendant-counterclaimant has admitted that she sought to establish a rival company to compete with ARTS4ALL. Simply put, there was no agreement that defendant-counterclaimant is entitled to covet and perhaps distribute ARTS4ALL's proprietary information, did not occur.

CONCLUSION

75. Defendant-counterclaimant's motion should be denied in all respects.

Dated: New York, New York

/s/
ZACHARY R. GREENHILL, ESQ.
GREENHILL PARTNERS, P.C.
Attorneys for Plaintiffs and
Additional Defendant on the
Counterclaims PETER OSGOOD
555 Fifth Avenue

New York, New York 10017
(212) 661-5500

Exhibit 1 to Greenhill Affirmation - Affidavit of Dan Schwartz, sworn to March 31, 2006, with Decision and Order of the Honorable Rolando T. Acosta, dated May 19, 2005 (Decision Reproduced in the Record on Appeal at pages 179 to 181) [pp. SR51 - SR54]

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 101123/03

[Dated March 31, 2006]

ARTS4ALL LTD AND RICHARD)
HUMPHREY,)
)
Plaintiffs,)
)
-against-)
)
JUDITH L. HANCOCK,)
)
Defendant and Counterclaimant.)
)
)
JUDITH L. HANCOCK,)
)
Counterclaimant,)
)
-against-)
)
DANIEL Y C NG, ROBERT McBAIN,)

JOEL MEYERSON, AND PETER OSGOOD,)
)
Additional Defendants)
On the Counterclaims.)
)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF)

DAN SCHWARTZ, being duly sworn, hereby deposes and says:

1. I am the accountant for ARTS4ALL, LTD, and a Certified Public Accountant licensed by the State of New York, fully familiar with the preparation of financial reports of that company.

2. I understand that it is being claimed that ARTS4ALL is in default of a May 19, 2005 order. This requires that it produce in "final" i.e. "non-draft" a fiscal year 2005 profit and loss statement and balance sheet for fiscal year 2005 and copies of the same profit and interim financial information in the same manner as is provided to other shareholders, i.e. "such as quarterly profit and loss statements". A copy of the order is attached to my affidavit as Exhibit "A".

4. These documents do not exist.

5. The reason these documents do not exist is that we do not have third party information required to make year end adjusting journal entries. These adjusting journal entries are required complete the

"Compilation report" which is the "final" report. Also, there are no ARTS4ALL federal or state corporate tax returns for 2005 since we did not have the information required to make the adjusting journal entries by the due date of the federal and state corporation tax returns. That date was March 15, 2006. An extension request was filed for these tax returns and they are currently due on September 15, 2006.

/s/________________
DAN SCHWARTZ

Sworn to before me this
31 day of March, 2006

/s/________________
Notary Public

SHERRY KRAMER
Notary Public, State of New York
No. 4709437
Residing in Rockland County
Commission Expires August 31, 2006

Exhibit "A"

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number: 101123/2003

[Filed June 8, 2005]

PRESENT: HON. ROLANDO T. ACOSTA PART 61
,Justice

ARTS4ALL)
)
vs)
)
JUDITH L. HANCOCK,)
)

INDEX NO.	101123/03
MOTION DATE	
MOTION SEQ. NO.	011
MOTION CAL. NO.	

The following papers, numbered 1 to ______ were read on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits . . .	1-3 (1-25)
Answering Affidavits – Exhibits ______________	4-5 (A-C
Replying Affidavits ______________	6

None of the post-argument letters have been considered.

Cross-Motion ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision dated May 19, 2005.

This constitutes the Decision and Order of the Court.

Dated May 24, 2005

SO ORDERED

/s/ ______________________
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION
☒ NON-FINAL DISPOSITION

Check if appropriate:

☐ DO NOT POST
☐ REFERENCE

Exhibit 2 to Greenhill Affirmation - Affidavit of Richard Humphrey, sworn to March 31, 2006, with Fax Cover Sheet and Letter, dated November 18, 2005

[pp. SR55 - SR65]

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

Index No. 101123/03

[Dated March 31, 2006]

ARTS4ALL LTD AND RICHARD HUMPHREY,)
)
Plaintiffs,)
)
-against-)
)
JUDITH L. HANCOCK,)
)
Defendant and Counterclaimant.)
)

JUDITH L. HANCOCK,)
)
Counterclaimant,)
)
-against-)
)
DANIEL Y C NG, ROBERT McBAIN, JOEL MEYERSON, AND PETER OSGOOD,)

Additional Defendants)
On the Counterclaims.)
————————————————)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD HUMPHREY, being duly sworn, hereby deposes and says:

1. I am co-plaintiff and a defendant on the counterclaims and President of co-plaintiff ARTS4ALL LTD., fully familiar with the facts and circumstances in the above-captioned matter by reason of personal knowledge of events and my review of the file.

2. This affidavit is respectfully submitted in opposition to the motion of plaintiff ARTS4ALL's former general counsel, JUDITH L. HANCOCK ["defendant/counterclaimant"] to strike the remaining cause of action in the complaint. The purpose of this affidavit is to address the content of orders made by Your Honor, which defendant/counterclaimant misstates, apparently because no reporter was present recording the proceedings.

3. ARTS4ALL has turned over 6,223 pages of documents, well beyond that which Your Honor ordered ARTS4ALL to produce. We did this to demonstrate that ARTS4ALL has nothing to hide and is cooperating in discovery.

4. Ironically, HANCOCK has never turned over a single document in response to the document demand of plaintiffs and PETER OSGOOD ["plaintiffs/OSGOOD"], even though Your Honor denied, by decision and order, dated April 25, 2005 defendant/counterclaimant's motion for a protective order striking plaintiffs/OSGOOD'S document demand. I understand that this default will be the subject of a motion to be made by ARTS4ALL to strike the counterclaims based on this discovery default by defendant/counterclaimant.

5. On November 17, 2005, I was in court when Your Honor ruled on plaintiffs/OSGOOD's objections to defendant/counterclaimant's document demand. Objection was made on two bases: that the demand was so broad that it required ARTS4ALL to produce every scrap of paper it has and that it was so broad that it would be impossible to satisfy, paving the way for a motion claiming discovery default.

6. I explained to Your Honor that ART4ALL is not an enormous company with hundreds of employees and unlimited personnel resources, but, rather, a five person company, with barely enough resources to function, struggling to survive, which defendant/counterclaimant is attempting to destroy. Also, I recall telling Your Honor that ARTS4ALL had been waiting for three years for the discovery process to commence and would do whatever it takes to move this case forward.

7. Your Honor ordered that ARTS4ALL provide as many documents as possible about the "Ohio: State of the Arts" initiative by close of business the following day, November 18, 2005. Also, Your Honor granted my

counsel's request that defendant/counterclaimant provide a list of documents in priority order so that the most important documents could be produced first.

8. We produced 1,350 pages of documents which, I understand, were ready for pick-up by defendant/counterclaimant's attorney-of-record before the close of the business day on November 18, 2005.

9. ARTS4ALL went out of business for an entire day to produce the documents.

10. Every document we could find about the arts initiative was produced. All of ARTS4ALL's employees worked on pulling entire files out of our file cabinets, downloading and printing out documents from computer files, (which was the fastest way to get them in "hard copy" and our efforts were also directed at providing "hard copies" of all signed original documents as well). We even provided drafts of documents. If a document had *any* relationship, no matter how tangential, to the arts initiative, we produced it. We even produced documents on other initiatives on which defendant/counterclaimant worked.

11. On November 18, 2005, Your Honor ordered that ARTS4ALL did not have to provide any more documents beyond e-mails in which HANCOCK's name was mentioned. Your Honor gave this order after we met with Your Honor in chambers. We gave Your Honor the list of documents, purportedly in order of priority, with its demands for "all" documents in 20 categories, with sub-categories, within which were still more sub-categories and within those were still more

subcategories. A copy of the list is attached as Exhibit "A" to this affidavit.

12. Nevertheless, after Your Honor's order, my counsel and I decided that ARTS4ALL would continue to turn over documents, even though not required. We believed that it would demonstrate that ARTS4ALL has nothing to hide and was doing everything possible to move the case along in a spirit of cooperation.

13. Lastly, I understand that a claim is being made by defendant/counterclaimant that I destroyed evidence in December, 2004. None of these documents, to the best of my knowledge, concerned defendant/counterclaimant and this case. The counterclaims were first commenced on February 27, 2003. Defendant/counterclaimant's document demand was received on October 14, 2005, more than two years and seven months after the counterclaims were commenced.

/s/
RICHARD HUMPHREY

Sworn to before me this
31st day of March 2006

/s/
Notary Public

TRACHTENBERG RODES & FRIEDBERG LLP
ATTORNEYS AT LAW
545 FIFTH AVENUE
NEW YORK, NEW YORK 10017

DAVID G. TRACHTENBERG
LEONARD A. RODES
BARRY J. FRIEDBERG

TELEPHONE (212) 972-2929
TELECOPIER (212) 972-7581
DTRACHTENBERG@TRFLAW.COM

FAX COVER SHEET

TO: Zachary R. Greenhill, Esq.

FAX NO: (212) 661-5509

FROM: David G. Trachtenberg, Esq.

DATE: November 18, 2005

NUMBER OF PAGES *(Including Cover Sheet)*: 5

MESSAGE: Please see attached.

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November 18, 2005

By Telecopier

Zachary Greenhill, Esq.
Greenhill Partners, P.C.
555 Fifth Avenue
New York, NY 10017

Re: New York Supreme Court Index No. 101123/2003
Arts4AlL, Ltd. and Richard Humphrey v. Judith L. Hancock

Dear Mr. Greenhill:

Pursuant to our conference with Justice Acosta yesterday afternoon and without prejudice to Ms. Hancock's First Demand for Production of Documents dated October 14, 2005, please produce the following documents by close of business today:

1. All documents (including e-mails and other correspondence) relating to Arts4All's first cause of action concerning the alleged "Ohio: State of the Arts" project (the "Alleged Project"), including, but not limited to:

   (a) All documents referring to or describing the Alleged Project and any proposed budget therefor;

   (b) All Congressional bills, reports and speeches referring to or concerning the Alleged Project;

   (c) All contracts, letters of intent, memoranda of understanding and correspondence between Arts4All, Ltd. and The University of Toledo, the Ohio Supercomputing Center, or any other entity or person concerning the Alleged Project;

   (d) All correspondence and other documents concerning the Alleged Project exchanged between Arts4All (or any person or entity acting on its behalf) and any of the following: any Member of Congress or Congressional employee, any official or employee of the State of Ohio, any other federal or state government official, The University of Toledo, the Ohio Supercomputing Center, the University of Akron, the Ohio Arts Council or my other person or entity in Ohio; and

(e) All correspondence and other documents exchanged between Arts4All (or any person or entity acting on its behalf) and any of the following persons or entities concerning the Alleged Project or Arts4All's activities in Ohio: J.R. Kirkland, FBA Inc., Janet Walsh, Daniel Ng, Peter Osgood, Joel Meyerson, Robert McBain, Mitchell Korn, Artsvision and any potential supplier of content or services for the Alleged Project.

2. All documents evidencing or concerning defenses to each of Hancock's counterclaims.

3. All minutes of all meetings of the board of directors of Arts4A11, Ltd. held at any time after January 1, 2001 , including all documents attached thereto or considered during such meetings, including the minutes of the board of directors meeting or meetings at which the board authorized Arts4All, Ltd. to sue Hancock.

4. All documents (including e-mails) concerning the Arts4All, Ltd. annual shareholders meeting held on July 16, 2002, Hancock's attendance at such meeting, Hancock's request for financial information at such meeting and Hancock's counterclaim concerning such meeting, including:

   (a) copies of all proxies voted by Humphrey at such meeting; and

   (b) all drafts of the minutes of such meeting and all e-mails relating thereto.

5. All letters that Arts4All's counsel, Alson R. Martin, Esq., sent to Hancock after June 12, 2002, including that certain letter that Mr. Martin sent to Hancock enclosing a copy of Arts4All's 2001 profit and loss statement and a copy of the profit and loss statement enclosed in such letter. All letters sent by Al Martin to Constance Wray. All letters sent by Al Martin to Louisburg High School.

6. All documents concerning Arts4All's issuance of common stock to Sopwith Camel, Ltd. ("Sopwith") on or about January 1, 2003, including:

   (a) a copy of any Board minutes and/or Board resolution authorizing Arts4All to issue such stock to Sopwith;

   (b) a copy of Sopwith's subscription agreement dated on or about October 9, 2002;

   (c) all documents (including cancelled checks, wire transfer instructions and bank statements) evidencing the consideration that Sopwith paid for the shares of common stock issued to it on or about January 1, 2003;

   (d) all documents evidencing communications (including e-mails) by, between and among Humphrey, Osgood, Daniel Ng, Robert McBain and/or Joel Meyerson concerning Sopwith's purchases of such stock; and

(e) all notices sent to any shareholders, including Mary Ellen Foley and Thomas Kornackcr, informing them of the proposed sale of common stock to Sopwith and offering them an opportunity to buy into such issuance.

7. All documents evidencing Daniel Ng's, direct and indirect, financing of and investment in Arts4All and its predecessor entity MasterVision International, Ltd., including but not limited to:

   (a) all agreements (including promissory notes, loan agreements and subscription agreements) between Arts4All, Ltd. and Sopwith Camel, Ltd. during the period January 1, 1996 through date of production;

   (b) all wire transfer instructions and notices evidencing transfers of money from Sopwith Camel, Ltd. to MasterVision International, Ltd. between January 1, 1996 and December 31, 2000; and

   (c) all wire transfer instructions and notices evidencing transfers of money from Sopwith Camel, Ltd. to Arts4All, Ltd. from January 1, 2000 through date of production.

8. Arts4All's bank statements for 2005, including cancelled checks. Any Board resolution or other document concerning who has signing authority over Arts4All's bank accounts.

9. All draft and final private placement memoranda and other investment solicitation materials prepared by or on behalf of Arts4All during the period between January 1, 2001 and December 31, 2002, including any such documents provided to Allen & Company, Inc., Donald Keough, Nancy Peretsmann, Alan Patricof and Apax Partners and all correspondence (including e-mails) between Arts4All and any of the aforementioned entities and persons during the period January 1, 2001 and December 31, 2002. All confidentiality agreements signed in favor of Arts4All during the period November 15, 2000 through December 31, 2002.

10. All e-mails, letters and other documents sent to any one on or after June 1, 2002 referring to or concerning the termination of Hancock's employment or her departure from Arts4All, Ltd., including any e-mail or e-mails sent by or on behalf of Humphrey to Ed Marquette on or after June 1, 2002 referring to or concerning the termination of Hancock's employment or her departure from Arts4All, Ltd.

11. All agreements and draft agreements between Arts4All and Richard Humphrey at any time after July 1, 1997, including, but not limited to, that certain draft employment agreement for Humphrey presented to the Arts4All board of directors in 2001 and/or 2002, including all drafts of such agreement sent to Al Martin and all drafts of such

agreement sent to Ed Marquette and all e-mails concerning all such drafts. All W-2 Forms issued by Mastervision International, Inc. to Richard Humphrey for the years 1997 through 2000. All W-2 Forms issued by Arts4All, Ltd., to Richard Humphrey for the years 2000 through 2004

12. All agreements between Arts4All and Peter Osgood entered into at any time after January 1, 2000.

13. All letters or e-mails in the possession of Arts4All, Humphrey, Osgood, or Peter Panken addressed to Hancock by anyone.

14. All letters or e-mails in the possession of Arts4All, Humphrey, Osgood, or Peter Panken which indicated that they were from Hancock. All documents summarizing oral statements by Hancock.

15. All videotapes, films or sound recordings of Hancock in the possession of any of the following persons or entities: Arts4All, Humphrey, Osgood, or any agent of Arts4All, Humphrey or Osgood.

16. All invoices and expense reimbursement forms submitted to Arts4All by Hancock. Copies of all cancelled checks issued to Hancock by Arts4All.

17. All documents (including e-mails) between Humphrey and any of the following persons referring to or concerning Hancock at any

time during the period between June 1, 2000 and December 31, 2002: Daniel Ng, Peter Osgood, Joel Meyerson, Robert McBain, Cheryl Dolby, Maryellen Kernaghan, Janet Walsh, and J.R. Kirkland.

18. All documents (including e-mails) evidencing or concerning any investigation or other action that Arts4All's board of directors undertook concerning any of the matters discussed in Hancock's August 19, 2002 memorandum addressed to Daniel Ng, Peter Osgood, Joel Meyerson and Robert McBain.

19. Arts4All's employee handbook currently in effect and all versions thereof in effect during the period November 1, 2000 through June 12, 2002.

✓ 20. All federal, state and local tax returns filed by MasterVision International, Ltd. for 1996 through 2000 and all federal, state and local tax returns filed by Arts4All, Ltd. for 1999 through 2004: including all New York license fee tax returns (Form CT-240) and all correspondence between Arts4All and New York State tax authorities relating to such tax years.

Sincerely,

/s/
David G. Trachtenberg

Excerpts from Exhibit 6 to Greenhill Affirmation - First Demand for Answers to Interrogatories, dated October 18, 2005 [pp. SR110, SR129]

10/18/2005 18:26 2129727581 TRACHTENBERG ET AL. PAGE 03/23

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SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

Index No. 03 101123

[Dated October 18, 2005]

ARTS4ALL, LTD. AND RICHARD)
HUMPHREY,)
)
Plaintiffs,)
)
-against-)
)

JUDITH L. HANCOCK,

Defendant and Counterclaimant.

JUDITH L. HANCOCK,

Counterclaimant,

-against-

DANIEL Y C NG, ROBERT McBAIN,
JOEL MEYERSON, AND PETER OSGOOD,

Additional Defendants
On the Counterclaims.

FIRST DEMAND FOR ANSWERS TO INTERROGATORIES

TO: ARTS4ALL, LTD., RICHARD HUMPHREY AND PETER OSGOOD

PLEASE TAKE NOTICE, THAT DEFENDANT AND COUNTERCLAIMANT Judith L. Hancock, Esq.,, by the undersigned. hereby demands, pursuant to CPLR § 3130 *et. seq.*, of the plaintiffs Arts4All, Ltd. and Richard Humphrey and the counterclaim defendant Peter Osgood answers to the following interrogatories.

Definitions

A. The term "Arts4All" refers to Arts4All, Ltd., including its predecessor entity Mastervision International Ltd., and any and all of its officers, directors, employees, agents, representatives. subsidiaries, partners. and affiliates.

B. The term "Humphrey" means Richard Humphrey and any and all persons acting in concert with him.

* * *

Lawsuit? Attach to the answers to these Interrogatories, indexed to this Interrogatory, any board resolution authorizing advancement of such fees and expenses.

80. Has Humphrey signed any undertaking promising to repay legal fees and expenses that Arts4All has advanced on his behalf in connection with This Lawsuit in the event that it is determined that such sums must be repaid? Attach to the answers to these Interrogatories, indexed to this Interrogatory, any document containing any such repayment undertaking.

81. Has Osgood signed any undertaking promising to repay legal fees and expenses that Arts4All has advanced on his behalf in connection with This Lawsuit in the event that it is determined that such sums must be repaid? Attach to the answers to these Interrogatories, indexed to this Interrogatory, any document containing any such repayment undertaking.

82. Did Arts4All's board of directors authorize Arts4All to sue Hancock and, if so, (a) when and (b) which members of the board voted to authorize Arts4All to sue Hancock?

83. What is Humphrey's date of birth?

October 18, 2005
New York, NY

/s/ David G. Trachtenberg /by MG

David G. Trachtenberg, Esq.

Trachtenberg, Rodes & Friedberg, LLP
545 Fifth Avenue
New York, NY 100 17

Counsel to defendant and counterclaimant
Judith L. Hancock, Esq.

Exhibit 7 to Greenhill Affirmation - Excerpts from the Defendant/ Counterclaimant's Responses to Plaintiffs' and the Additional Defendant on the Counterclaims Peter Osgood's Second Demand for Answers to Interrogatories, dated October 19, 2005 [pp. SR132 - SR135]

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

Index No. 03 101123

[Dated October 19, 2005]

ARTS4ALL, LTD. AND RICHARD)
HUMPHREY,)
)
Plaintiffs,)
)
-against-)
)
JUDITH L. HANCOCK,)
)
Defendant and Counterclaimant.)

)
JUDITH L. HANCOCK,)
)
Counterclaimant)
)
-against-)
)
DANIEL Y C NG, ROBERT McBAIN,)
JOEL MEYERSON, AND PETER OSGOOD,)

Additional Defendants)
on the Counterclaims.)
)

DEFENDANT/COUNTERCLAIMANT' RESPONSES TO PLAINTIFFS' AND COUNTERCLAIM DEFENDANT OSGOOD'S SECOND DEMAND FOR ANSWERS TO INTERROGATORIES

Defendant and counterclaimant Judith L. Hancock ("Hancock") responds and objects to the Second Demand for Answers To Interrogatories (which also contain document production demands) (hereinafter such interrogatories and document demands are collectively referred to as "Requests") served by plaintiffs Arts4All, Ltd. ("Arts4All") and Richard Humphrey ("Humphrey") and additional counterclaim defendant Peter Osgood ("Osgood") as follows:

General Objections

1. These general objections apply to all of these Requests and are made in addition to the specific objections set forth in more detail below.

2. Hancock objects to the Requests to the extent that they call for information and production of documents protected from disclosure by the attorney-client and/or work-product privileges.

* * *

v. Government Employees Ins. Co., 2 Misc. 3d 347, 351 (Civ. Ct. Queens Cty. 2003) (citing numerous cases for the proposition that "the courts have generally required that a party must complete one discovery device before invoking the other").

11. Hancock objects to these Requests on the ground that she has not had adequate time to consult with her outside litigation counsel concerning these numerous Requests (numbering over 150, counting their sub-parts). These Requests were stayed under CPLR 3214 (b) until September 29, 2005, at which time, without an opportunity to engage in oral argument, the Court ordered all discovery to both commence and end within 30 days. During the two weeks since September 29, 2005, Hancock has prepared, from scratch, all of the following discovery devices in connection with her multiple counterclaims: a document production request; two notices to admit genuineness of documents; a notice to admit certain facts; and a first set of interrogatories. During the same two-week period, Hancock has also been working on her answering brief to the **182-page** moving appeals brief that plaintiffs and Osgood served on September 5, 2005 and on her cross-appeal brief. During the same two-week period, Hancock has also been working on preparing a substantial supplemental appeals record to correct the error-filled record filed by plaintiffs and Osgood in the Appellate Division. Yet further, during the past couple of weeks, Hancock's outside litigation counsel has been out of the office for five days for the Jewish holidays and otherwise involved in intensive work on behalf of other clients. Yet further, Hancock's outside litigation counsel, David G. Trachtenberg, Esq., sought a telephone conference with the Court on October 17, 2005 to discuss a revised discovery schedule. Although plaintiffs' and Osgood's counsel, Zachary Greenhill, Esq., was in his office on October 17, 2005, he refused to take three calls that

Mr. Trachtenberg made to him on that day and he further refused to participate in a conference call with the Court on that day. Mr. Trachtenberg's October 17, 2005 letter made it clear that he would be out of the office for religious observance on October 18 and October 19, 2005. Mr. Trachtenberg has not read this document and his administrative assistant will be signing this document for him purely as an administrative act. In light of the foregoing, Hancock is not attaching hereto any document that has not already been served in this litigation inasmuch as Hancock has not had an adequate opportunity to consult with Mr. Trachtenberg about whether any other documents, if they exist (which is neither admitted nor denied herein), are responsive to these Requests. Copies of Mr. Trachtenberg's two October 17, 2005 letters to the Court are attached hereto.

12. Hancock objects to these Requests to the extent that they ask Hancock to copy, title and describe numerous documents that have already been served in or in connection with this litigation, often multiple times. Accordingly, unless otherwise indicated hereinafter, Hancock will not attach hereto copies of any documents previously served but will simply refer to such documents. Further, Hancock reserves the right to refer to any and all documents served in this litigation, both during any deposition and at trial.

* * *

made is, on its face, compelling evidence of the need for substantial punitive damages in this lawsuit.

Subject to and without waiving the foregoing general and specific objections, Hancock further responds: It may be further noted that in the aforementioned affidavit, plaintiff and Osgood deceitfully misquoted the relevant section of Arts4All's certificate of incorporation: they omitted the language which states that the charter does not immunize directors from liability "for those breaches and acts or omissions with respect to which the General Corporation Law of the State of Delaware, as from time to time amended, expressly provides that this provision [the charter] shall not eliminate or limit such personal liability of Directors." (See Arts4All's certificate of incorporation, art. EIGHTH (1)). That omission of critical text was another perfect example of the kind of deceitful litigation tactics repeatedly engaged in by Hancock's fiduciaries, solely for the malicious purpose of prolonging this lawsuit and inflicting more damages on Hancock.

Subject to and without waiving the foregoing general and specific objections, Hancock further responds: In short, the record is bulging with evidence of the kind of malicious, bad-faith, disloyal fiduciary breaches and pursuit of frivolous SLAPP claims warranting the imposition of substantial punitive damages, calculated in accordance with controlling precedents.

October 19, 2005
New York, New York

/s/ David G. Trachtenberg /by MG

David G. Trachtenberg, Esq.

Trachtenberg, Rodes & Friedberg LLP
545 Fifth Avenue

New York, New York 10022
(212) 972-2929

Attorneys for Defendant and
Counterclaimant Judith L. Hancock

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Judith L. Hancock, am the defendant and counterclaimant in the above-titled action. I have read the foregoing Defendant/Counterclaimant's Responses to Plaintiffs' and Counterclaim Defendant Osgood's Second Demand for Answers to Interrogatories, and I know the contents thereof; and the same is true to the best of my knowledge and belief.

I wish to note that for the reasons stated in General Objection No. 11 on page 3 above, my outside litigation counsel, David G. Trachtenberg, Esq., has not had the opportunity to read the foregoing document and his administrative assistant is signing the foregoing document for him as an administrative matter.

/s/
Judith L. Hancock

Sworn to before me this
19th day of October 2005.

/s/
Notary Public

LEONARD ANTHONY RODES
Notary Public, State of New York
No. 4960956
Qualified in Nassau County
Commission Expires January 8, ~~1992~~ 2006

Exhibit 9 to Greenhill Affirmation - Letters, dated November 18, 21, 23, and 28, 2005 [pp. SR137 - SR142]

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ZACHARY R. GREENHILL
OF COUNSEL

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(212) 661-5509

November 18, 2005

BY HAND/PICK-UP

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg, LLP
545 Fifth Avenue
New York, New York 10017

Re: Arts4All Ltd. and Richard Humphrey v.
Judith L. Hancock
Index No. 03 101123
Our File No. 4656

Dear Mr. Trachtenberg:

Enclosed please find 1,385 pages concerning the Ohio initiative.

Very truly yours,

/s/

ZACHARY R. GREENHILL

ZRG:mco

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November 21, 2005

BY HAND

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg, LLP
545 Fifth Avenue
New York, New York 10017

Re: Arts4All Ltd. and Richard Humphrey v.
Judith L. Hancock

Index No. 03 101123
Our File No. 4656

Dear Mr. Trachtenberg:

Enclosed please find pages 1,351-3,643 in response to the orders of Justice Acosta on November 17, 2005 and earlier today.

Also enclosed please find copies of all exhibits marked during the deposition of defendant and counterclaimant Judith L. Hancock with the exception of the "boards" which are identical to documents already in your possession.

Very truly yours,

/s/

ZACHARY R. GREENHILL

ZRG:mco
Encl.

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November 23, 2005

BY HAND

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg, LLP
545 Fifth Avenue
New York, New York 10017

Re: Arts4All Ltd. and Richard Humphrey v.
Judith L. Hancock

Index No. 03 101123
Our File No. 4656

Dear Mr. Trachtenberg:

Enclosed please find pages 3,644 to 5,169 in response to the order of Justice Acosta on November 17, 2005.

Very truly yours,

/s/

ZACHARY R. GREENHILL

ZRG:mco
Encl.

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OF COUNSEL

—

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November 28, 2005

BY HAND

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg, LLP
545 Fifth Avenue
New York, New York 10017

Re: Arts4All Ltd. and Richard Humphrey v.
Judith L. Hancock

Index No. 03 101123
Our File No. 4656

Dear Mr. Trachtenberg:

Enclosed please find pages 5,170 to 5,440 in response to the order of Justice Acosta on November 17, 2005.

Very truly yours,

/s/

ZACHARY R. GREENHILL

ZRG:mco
Encl.

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November 28, 2005

David G. Trachtenberg, Esq.
Trachtenberg Rodes & Friedberg, LLP
545 Fifth Avenue
New York, New York 10017

Re: Arts4All Ltd. and Richard Humphrey v.
Judith L. Hancock
Index No. 03 101123
Our File No. 4656

Dear Mr. Trachtenberg:

We write in response to your letter of November 23, 2005.

As you know, Justice Acosta ordered that we produce as many documents as we could by 5:00 p.m. on November 18, 2005. It is these documents in part about which you complained.

The most expeditious way in which we could do this was to print from the files maintained on Arts4All's computer system. Please provide a list in priority order, by Bates number, of those documents for which you require a signed copy.

Recall that at the last conference with Justice Acosta plaintiff Richard Humphrey read aloud from your overly broad and prolix demands in the letter which was supposed to prioritize and narrow that which you seek. Justice Acosta then instructed that plaintiff Arts4All Ltd. check our files for e-mails which mention defendant-counterclaimant Judith L. Hancock. We have provided documents beyond the scope of that instruction.

Very truly yours,

/s/

ZACHARY R. GREENHILL